SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 368

A BOOK NAMED "JOHN CLELAND'S MEMOIRS OF A WOMAN OF PLEASURE", G. P. PUTNAM'S SONS (INTERVENOR), APPELLANTS,

vs.

ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS.

APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

INDEX

	Original	Print
Record from the Superior Court, within and for the County of Suffolk, Commonwealth of Massachusetts, No. 82126 Eq.		
Petition	1	1
Opinion, Hudson, J. that there is reasonable cause to believe that a book, etc.	2	2
Order of notice directed against a book etc., returnable March 19, 1964	3	3
Motion of the Attorney General for an interlocutory finding and adjudication and allowed	5	5
Interlocutory finding and adjudication	6	5
Answer of G. P. Putnam's Sons, Intervenor	6	6
Request for report of evidence and designation of stenographer and allowed	8	7

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	Original	Print
Record from the Superior Court, within and for the County of Suffolk, Commonwealth of Massachusetts, No. 82126 Eq.—Continued		
Transcript of testimony, May 27, 1964	10	8
Appearances	10	8
Colloquy between court and counsel re Exhibit A	11	8
Testimony of John E. Collins—		
direct	13	10
cross	19	15
Offer of Proof—Exhibit 1—Photostatic copy of Page 2, The New York Times Book Review, July 28, 1963, containing column entitled, "Speaking of Books," by J. Donald Adams	28	24
Offer of Proof—Exhibit 2—Article entitled, "The Harlot's Progress," by V. S. Pritchett, from October 31, 1963 edition of The New York Review of Books	31	27
Offer of Proof—Exhibit 3—Article entitled, "Mersey Sound, 1750," by Brigid Brophy, from November 15, 1963 issue of "New Statesman", page 710	36	33
Offer of Proof—Exhibit 4—Item bearing sub-heading "Taste" under the heading "Modern Living" from August 2, 1963 issue of TIME Magazine	41	38
Petitioner rests	44	40
Testimony of Fred Holly Stocking—		
direct	45	41
cross	48	44
redirect	58	52
John M. Bullitt—		
direct	59	53
cross	64	57
redirect	69	62
recross	69	63

	Original	Print
Record from the Superior Court, within and for the County of Suffolk, Commonwealth of Massachusetts, No. 82126 Eq.—Continued		
Transcript of testimony, May 27, 1964—Continued		
Testimony of Robert H. Sproat—		
direct	69	63
cross	73	66
redirect	76	69
Norman N. Holland—		
direct	77	70
cross	81	74
redirect	84	77
Colloquy between court and counsel re exhibits	85	78
Testimony of Walter Minton—		
direct	90	82
Ira Konigsberg—		
direct	92	84
cross	102	93
Argument by Mr. Rembar	103	94
Argument by Mr. Sullivan	107	98
Stenographer's certificate (omitted in printing)	109	100
Findings of fact, ruling of law and order for final decree	110	100
Final decree	124	117
Claim of appeal of intervener, G. P. Putnam's Sons	125	118
Certificate and order of Trial Judge as to exhibits under Rule 6	126	118
Proceedings in the Supreme Judicial Court for the Commonwealth of Massachusetts #S6543	129	120
Opinion, Spalding, J.	129	120
Opinion, dissenting, Whittemore, J.	141	125
Opinion, dissenting, Cutter, J.	147	127
Judgment—Rescript	155	130
Docket entries	159	131

	Original	Print
Record from the Superior Court, within and for the County of Suffolk, Commonwealth of Massachusetts, No. 82126 Eq.	161	132
Final decree after rescript	161	132
Docket entries	167	133
Notice of appeal to the Supreme Court of the United States by G. P. Putnam's Sons, Intervenor	173	137
Judge's certificate and Clerk's certificate thereto (omitted in printing)	185	140
Clerk's certificate (omitted in printing)	187	140
Order noting probable jurisdiction	188	141

[fol. 1]

IN THE SUPERIOR COURT WITHIN AND FOR THE COUNTY OF SUFFOLK, COMMONWEALTH OF MASSACHUSETTS

No. 82126 Eq.

EDWARD W. BROOKE, Attorney General,

v.

A BOOK NAMED, "JOHN CLELAND'S MEMOIRS OF A WOMAN OF PLEASURE" (COMMONLY KNOWN AS FANNY HILL).

PETITION—Filed February 10, 1964

Respectfully represents your petitioner, Edward W. Brooke, of Newton, in the County of Middlesex, and Commonwealth of Massachusetts, that he is the Attorney General of Massachusetts; that there is reasonable cause to believe that a book named "John Cleland's Memoirs of a Woman of Pleasure" (commonly known as Fanny Hill) is being imported, sold, loaned, or distributed in the Commonwealth; and that said book is obscene, indecent and impure; that the name of the publisher and copyright holder of said book is G.P. Putnam's Sons of the City of New York, and the author is John Cleland.

Wherefore, your petitioner prays

1. that an order of notice issue directed against said book named "John Cleland's Memoirs of a Woman of Pleasure" (commonly known as Fanny Hill) and of all persons interested in the publication, sale, loan, or distribution thereof, [fol. 2] and to the publisher, copyright holder and author thereof as required by law to show cause why said book should not be judicially determined to be obscene, indecent and impure.

2. that this Honorable Court make an interlocutory finding and adjudicate that said book is obscene, indecent and impure.

3. that this Honorable Court enter a final decree adjudging said book to be obscene, indecent and impure.

4. for such other and further relief as appears mete and just in the premises.

Edward W. Brooke, Attorney General, By: Walter Jay Skinner, Assistant Attorney General.

OPINION OF JUSTICE OF SUPERIOR COURT THAT THERE IS REASONABLE CAUSE TO BELIEVE THAT A BOOK NAMED "JOHN CLELAND'S MEMOIRS OF A WOMAN OF PLEASURE" (COMMONLY KNOWN AS FANNY HILL), IS OBSCENE, INDECENT AND IMPURE AND ORDER FOR ISSUANCE OF ORDER OF NOTICE—Entered February 10, 1964

Upon the filing of the Petition of Honorable Edward W. Brooke, Attorney General of the said Commonwealth adjudicating that the book named "John Cleland's Memoirs of a Woman of Pleasure" (commonly known as Fanny Hill), which Petition is incorporated herein by reference, I, Eugene A. Hudson, a Justice of the Superior Court of said Commonwealth, in accordance with the provisions of General Laws, Chapter 272, Section 28C as amended, examining [fol. 3] said book (marked "A") by reading and studying its entire contents and I am of the opinion that there is a reasonable cause to believe that such book is obscene, indecent and impure, therefore, it is Ordered that an Order of Notice issue returnable on Thursday, March 19, 1964, directed against said book named "John Cleland's Memoirs of a Woman of Pleasure" (commonly known as Fanny Hill), and addressed to all persons interested in the publication, sale, loan or distribution thereof, to show cause why said book should not be judicially determined to be obscene, indecent or impure.

Said Order of Notice should be given by publication once each week for three (3) successive weeks in a daily newspaper, published in the City of Boston, and a copy of said Order of Notice shall be sent by Registered Mail to the Publisher and copyright holder of said book whose name appears on said book as G. P. Putnam's Sons of the City of New York, fourteen days at least before said return day of the Order of Notice.

Eugene A. Hudson, Justice of the Superior Court.

ORDER OF NOTICE DIRECTED AGAINST A BOOK NAMED "JOHN CLELAND'S MEMOIRS OF A WOMAN OF PLEASURE" (COMMONLY KNOWN AS FANNY HILL)—Entered February 10, 1964

To All Persons Interested in the Publication, Sale, Loan or Distribution of a Book Named, "JOHN CLELAND'S MEMOIRS OF A WOMAN OF PLEASURE" (commonly known as Fanny Hill):

Whereas a Petition in Equity has been begun in our Superior Court for the County of Suffolk reading as follows:

[fol. 4] "PETITION

Respectfully represents your petitioner, Edward W. Brooke, of Newton, in the County of Middlesex, and Commonwealth of Massachusetts, that he is the Attorney General of Massachusetts; that there is reasonable cause to believe that a book named "John Cleland's Memoirs of a Woman of Pleasure" (commonly known as Fanny Hill) and marked Ex. A is being imported, sold, loaned, or distributed in the Commonwealth; and that said book is obscene, indecent and impure; that the name of the publisher and copyright holder of said book is G. P. Putnam's Sons of the City of New York, and the author is John Cleland.

Wherefore, your petitioner prays

1. that an order of notice issue directed against said book named "John Cleland's Memoirs of a Woman of Pleasure" (commonly known as Fanny Hill) and of all persons interested in the publication, sale, loan or distribution thereof, and to the publisher, copyright holder and author thereof as required by law to show cause why said book should not be judicially determined to be obscene, indecent and impure.

2. that this Honorable Court make an interlocutory finding and adjudicate that said book is obscene, indecent and impure.

3. that this Honorable Court enter a final decree adjudging said book to be obscene, indecent and impure.

4. for such other and further relief as appears meet and just in the premises.

EDWARD W. BROOKE
Attorney General

By: WALTER JAY SKINNER
WALTER JAY SKINNER
Assistant Attorney General"

And on February 10, 1964, Hon. Eugene A. Hudson, a Justice of the Superior Court filed a statement, as appears [fol. 5] in the files of said case, that he had examined said book as required by G. L. Chapter 272, s. 28C and was of opinion that there is reasonable cause to believe that said book is obscene, indecent or impure: And ordered the issuance of this order of notice.

Now therefore, We Command You that on the nineteenth day of March, 1964, which day is the return day of this order of notice, you appear and show cause, if any you have, why said book should not be judicially determined to be obscene, indecent or impure.

Hereof fail not, at your peril, as otherwise said petition may be adjudged and orders and decrees entered in your absence.

And it is ordered that the petitioner shall serve this notice by the publication thereof once each week for three successive weeks in a daily newspaper, published in the City of Boston, and by sending by registered mail a copy thereof to the Publisher and copyright holder of said book whose name appears on said book as G. P. Putnam's Sons of the City of New York, fourteen days at least before said return day of the Order of Notice.

By the Court, (Hudson, J.), Francis P. Concannon, Assistant Clerk.

MOTION OF ATTORNEY GENERAL FOR AN INTERLOCUTORY FINDING AND ADJUDICATION

Now comes Edward W. Brooke, Attorney General of the Commonwealth of Massachusetts, and moves that this Honorable Court make an interlocutory finding and adjudication that said book "John Cleland's Memoirs of a Woman of Pleasure" (commonly known as Fanny Hill) is obscene, indecent and impure.

Edward W. Brooke, Attorney General, By: Walter Jay Skinner, Assistant Attorney General.

February 10, 1964, Filed and allowed. (Hudson, J.)

[fol. 6]

INTERLOCUTORY FINDING AND ADJUDICATION— Entered February 10, 1964

This cause came on to be heard at this sitting upon the Motion of the Attorney General, and after issuance of an Order of Notice, in accordance with the provisions of G. L. Ch. 272, Section 28C as amended by Chap. 278 Section 1 of Acts of 1945, and after hearing thereon the Court makes an Interlocutory Finding and Adjudication that the book, "John Cleland's Memoirs of a Woman of Pleasure" (Commonly known as Fanny Hill), (marked Ex. A) is obscene, indecent and impure.

By the Court, (Hudson, J.), Francis P. Concannon, Assistant Clerk.

ANSWER OF G. P. PUTNAM'S SONS, INTERVENER—
Filed March 19, 1964

Now comes G. P. Putnam's Sons, a New York corporation, hereinafter referred to as the intervener, and answers the petition in this case as follows:

1. The intervener admits that Edward W. Brooke is the Attorney General of Massachusetts, that the book against which this proceeding is brought was on or about the date of the filing of this petition imported, sold and distributed in the Commonwealth, that the intervener is the publisher and holder of the copyright of said book, and (further answering) that it is interested in the sale, loan or distribution of said book, and that John Cleland is the author of said book.

2. The intervener denies that said book is obscene, indecent or impure, and further answering says that:

A. The sale and distribution of said book is protected by the First Amendment to the United States Constitution as applied to the States by the Fourteenth Amendment; [fol. 7] and the application of G.L. Chapter 272, Sections 28 C-H, if it results in an adjudication that said book is obscene, indecent or impure, is unconstitutional under the First and Fourteenth Amendments to United States Constitution. An adjudication, the effect of which would be to impede or prevent the sale or distribution of said book, would be an unconstitutional deprivation of rights guaranteed to the intervener by the said First and Fourteenth Amendments to the United States Constitution.

B. An actual controversy exists between the Attorney General and the intervener because the Attorney General intends to suppress the sale and distribution of said book, and such suppression will result in loss and damage to the intervener and its customers. The adjudication which the Attorney General seeks will impede and prevent the sale and distribution of said book, and the interlocutory adjudication heretofore made in these proceedings has already had this effect. Such adjudication and the interlocu-

tory adjudication heretofore made will result, and such interlocutory adjudication has already resulted, in loss and damage to the intervener and its customers.

Wherefore, the intervener prays that this Court

1. Adjudicate, pursuant to G.L. Chapter 272, Sections 28 C-H, that the book against which this proceeding is brought is not obscene, indecent or impure.

2. Enter a decree, pursuant to Chapter 231A of the General Laws, declaring that the sale and distribution of said book is protected by the First Amendment to the United States Constitution as applied to the States by the Fourteenth Amendment; that the application by the Attorney General of G.L. Chapter 272, Sections 28 C-H, if it results in an adjudication that said book is obscene, indecent or impure, or any other attempt by the Attorney General to suppress the sale or distribution of said book, is unconstitutional under the First and Fourteenth Amendments to the United States Constitution; and that any adjudication, the effect of which would be to impede or prevent the sale or distribution of said book, would be an unconstitutional deprivation of rights guaranteed to the intervener by the First and Fourteenth Amendments to the United States Constitution.

[fol. 8] 3. Grant such other and further relief to the intervener as may be appropriate.

G. P. Putnam's Sons, By its attorneys, Reuben Goodman, Charles Rembar.

Attest: Francis P. Concannon, Ass't. Clerk.

REQUEST FOR REPORT OF EVIDENCE AND DESIGNATION OF STENOGRAPHER—May 27, 1964, Filed and Allowed by the Court. (Macaulay, J.)

Now comes G. P. Putnam's Sons Intervener and requests that the evidence in the above-entitled case be reported to the full court of the Supreme Judicial Court and that a

stenographer be designated and sworn by this Honorable Court for such purpose.

By its attorneys, Reuben Goodman, Charles Rembar.

Attest: Albert F. Henneberry, Ass't. Clerk.

[fol. 9] In the above entitled case, at the hearing of the same it is ordered by the presiding justice (Macaulay, J.) that Mary H. Kevill be, and she hereby is, designated to report the testimony in said case, to the Supreme Judicial Court.

Attest: Albert F. Henneberry, Asst. Clerk.

May 27, 1964.

[fol. 10]

Transcript of Testimony—May 27, 1964

APPEARANCES:

John E. Sullivan, Esq., Assistant Attorney General, for the petitioner;

Charles Rembar, Esq., and Reuben Goodman, Esq., for the intervener, G. P. Putnam Publishing Company.

[fol. 11]

COLLOQUY BETWEEN COURT AND COUNSEL RE EXHIBIT A

The Court: At the opening of the case, there was a bench conference, at which time Mr. Charles Rembar of New York was given leave to try the case in behalf of the intervener, and he has filed his appearance.

Mr. Goodman: May the stenographer be appointed commissioner to take testimony?

The Court: The request for a commissioner is granted and the stenographer is authorized to take testimony.

Mr. Goodman: I have drafted an order that she be appointed to take testimony.

The Court: I don't think it is necessary.

Mr. Sullivan: There is a stipulation of counsel that this is the same book that was in issue before Judge Hudson.

The Court: Why can't that book go in as Exhibit A?

Mr. Rembar: No reason why it shouldn't.

The Court: Do you want to see if it is the right one?

Mr. Goodman: The hard cover and paperback are identical. They both have the same introduction.

The Court: That couldn't be because in the foreword of this book here, it gives some history about New York litigation after the hard cover book came out.

Mr. Rembar: What I meant was that everything that is in the hard cover is in here, and this has the additional comment.

The Court: That may be marked Exhibit A.

[fol. 12] (Paperback book entitled, "Fanny Hill, John Cleland's Memoirs of a Woman of Pleasure," is marked Exhibit A.)

Mr. Rembar: Some of my witnesses have been reading this edition and some have been reading the hard cover. Will the references be the same?

Mr. Sullivan: I have never seen the hard cover book, so I can only assume and take your statement that it is, except for the introduction, the same book.

Mr. Goodman: It is, Mr. Sullivan.

Mr. Sullivan: On that condition, that it is the same book, saving the introduction, I will not object on that ground.

Mr. Rembar: Saving the introduction which deals with the New York litigation. The Peter Quennell introduction is in both books.

Mr. Goodman: Would you like us to submit a copy of the hard cover?

The Court: I don't try cases. I would merely like to observe, however, that I have read fully the brief that was submitted last night, and I did read a passage in there wherein the intervener asks that the whole book, including the foreword and this Mr. Quennell's comment, be considered in determining the issues in this case.

Mr. Rembar: Yes, we do ask that, your Honor, and, so far as that is concerned, the hard cover and the paperback are identical. This is the book in evidence.

The Court: With the exception of this history of the New York litigation?

Mr. Rembar: Yes, sir.

[fol. 13] JOHN E. COLLINS, Sworn.

Direct examination.

By Mr. Sullivan:

Q. Would you give the Court your full name, please?

A. John E. Collins.

Q. Your residential address?

A. 157 Stratford Street, West Roxbury.

Q. How are you presently engaged, Dr. Collins?

A. I am Headmaster of the Newman Preparatory School.

Q. How long have you served in that capacity?

A. Four months.

Q. Would you give the Court your educational background, starting from the secondary school?

A. I graduated from Boston College in 1925 with a B.A. degree. I have a Master of Arts degree from Boston University, 1926. I have a Doctor of Philosophy degree from Boston College, 1936. I did graduate work at Harvard and at Oxford.

Q. How have you been employed since the completion of your education or during your education?

A. I was a classroom teacher at the Boston Latin School for twenty-two years. I was head of the English Department at the State College at Boston for sixteen years, as well as dean, academic dean and dean of the graduate school, until February 1st of this year, when I came to Newman Preparatory School. My area is English literature.

Q. In connection with your profession, have you lectured?

A. That has been my life.

Q. Prepared articles?

A. Yes.

Q. Contributed articles?

A. Yes.

Q. Have you read the book commonly called "Fanny Hill"?

A. Yes, sir.

[fol. 14] Q. In your opinion, is this book obscene, Doctor?

Mr. Rembar: If I may, your Honor, I object to that question. It calls for a conclusion of law. It deals with the ultimate determination that this Court must make, and it is not the subject of testimony.

The Court: You don't object as to his qualifications?

Mr. Rembar: I don't know what he has been qualified for, your Honor. I object to his qualifications insofar as they may be thought to make him an expert on matters of law.

The Court: What do you offer him for?

Mr. Sullivan: For his literary expert opinion. I have no basis of this gentleman knowing the law.

Mr. Rembar: The last question, it seems to me, is not a question which deals with the literary merits, or lack of merit, in this book. The word "obscene", as your Honor knows, is a legal concept, a constitutional concept. The opinions of the United States Supreme Court and the opinion of the Supreme Judicial Court of this state in the Tropic of Cancer case have made that very clear.

The Court: I can recognize that the legal concept of what obscene means is one thing; however, a concept of what obscene means in literature has some bearing on determining what the legal concept of obscene means.

I will allow him to answer.

Mr. Rembar: May I have an exception, your Honor?

The Court: Exception noted.

Q. I will repeat the question, Doctor. In your opinion, is the book commonly known as "Fanny Hill" obscene?

A. Yes.

[fol. 15] Q. In your opinion, is the book indecent?

A. Yes.

Mr. Rembar: I make the same objection to that question, your Honor.

The Court: I take it as a motion to strike the answer. The motion to strike is denied and your exception to it is noted.

Mr. Rembar: Thank you.

Q. In your opinion, is the book impure, Doctor?

Mr. Rembar: Same objection, your Honor.

The Court: Objection denied.

Mr. Rembar: Exception.

The Court: Exception noted.

Q. You may answer the question.

A. Yes.

Q. Do you have an opinion whether or not this publication appeals to prurient interest?

Mr. Rembar: Same objection, your Honor.

The Court: Objection denied.

Mr. Rembar: Exception.

The Court: You don't object to that, does he have an opinion?

Mr. Sullivan: I am only asking whether he has an opinion.

The Court: That would be just Yes or No, whether he has an opinion.

Mr. Rembar: That's correct.

[fol. 16] The Court: You may answer. Do you have an opinion?

Q. You may answer if you have an opinion.

A. You are asking me the difference between good and bad?

Q. I am asking you whether or not this publication would arouse prurient interest in a person or persons who read it?

Mr. Rembar: This is not "Have you an opinion?"

The Court: That is a different question than the one you asked before. The question before was, "Do you have an opinion whether this book has prurient interest," pru-

rient character, or something like that. That can be answered Yes or No. Has he an opinion?

Q. Do you have an opinion?

A. Yes.

Q. In the light of the fact that you do have an opinion, would you kindly state to the Court your opinion on whether or not this publication would arouse prurient interest in a reader or readers of this book?

Mr. Rembar: Objection, your Honor.

The Court: Objection denied.

Mr. Rembar: Exception.

The Court: Exception noted.

A. My subjective opinion, unconditionally, yes.

Q. You have recited that you have been in the literary field for some twenty-two years, Doctor?

A. More than that.

Q. More than that. Do you have an opinion whether or not this book has any literary merit?

A. I have an opinion.

Q. Would you give the Court that opinion?

A. It lacks literary merit.

[fol. 17] Q. Do you have an opinion whether or not this publication has any social importance?

A. I would have to make a speech to answer that.

Q. Well, first of all, Yes or No?

A. Yes, I have an opinion.

Q. What is that opinion, Doctor?

A. Well, when I read the book, I attempted to judge it merely from the point of view of a human document, somewhat like "Nana" or "Sister Carrie", but I couldn't find that it had any social significance nor any literary style that might lift it up beyond pornography.

Q. You said the word "pornography"?

A. Yes, sir.

Q. Do you have an opinion whether or not this book is pornographic?

A. Yes.

Q. What is that opinion, Doctor?
A. It is pornographic.

Mr. Rembar: I object to that, your Honor.
The Court: Objection denied.
Mr. Rembar: Same reason. Exception.
The Court: Exception noted.

Q. Are you familiar with the phrase, "hard core pornography"?
A. To a degree.
Q. To the degree that you are familiar with the phrase, would you classify this publication within hard core pornography?

Mr. Rembar: Same objection, your Honor.

A. In my opinion,—

The Court: Just a moment.
Of course, that term "hard core pornography" you took out of the decision of the Supreme Judicial Court.
[fol. 18] Mr. Rembar: By the same token, your Honor, the term "a prurient interest" is taken out of the Supreme Court decision.
The Court: "Prurient" is a word of many years', hundreds of years', usage. I will allow him to answer.
Exception noted.
The Witness: May I have the question again?

Q. The question is, in view of your familiarity within certain bounds of the term "hard core pornography," is this book in your opinion within the bounds of your understanding of that phrase?
A. Yes.
Q. Did you find the book offensive, Doctor?
A. Yes.
Q. Would you go so far as to say you found the book patently offensive?

Mr. Rembar: I object to that question, your Honor. There again, there is a precise legal formula developed

by the United States Supreme Court to express a legal conclusion, in the case of Manual Enterprises.

The Court: I know, but aside from the legal definition of "patently offensive", it might be a literary definition of it, or understanding. In that sense, I think the question is admissible.

I will allow it.

Mr. Rembar: Exception.

The Court: Exception noted.

Q. You may answer the question.

A. Yes.

Mr. Sullivan: Your witness, gentlemen.

[fol. 19] Cross examination.

By Mr. Rembar:

Q. Is it "Doctor"?

A. Yes.

Q. Dr. Connors?

A. Collins.

Q. Doctor, could you tell me what the Newman school is? I am a stranger here.

A. It is a preparatory school for boys.

Q. Is it denominational?

A. It is run by Catholic laymen.

Mr. Sullivan: I object and ask the answer be stricken.

The Court: Objection denied.

Q. If I heard you correctly, you said you had been Headmaster for a matter of four months?

A. Correct.

Q. Do you teach at the school?

A. No, sir.

Q. Had you been a teacher before you became Headmaster?

A. Where?

Q. Anywhere.

A. Yes.

Q. What courses did you teach?

A. Well, the English novel; comparative study of the novel; contemporary novel; three courses in Shakespeare; a course in biography—do you want a list of them all? I could go on forever if you want. I have been around a long time.

Q. Are you familiar with the English novels of the 18th century?

A. Yes, sir.

Q. Which of the 18th century novelists do you rate highest?

A. I don't rate any of them highest. I could give you five or ten names. I refuse to put one as supreme above twenty others.

Q. Would you name two or three that you regard as outstanding?

A. Richardson, Fielding, Jane Austen, Defoe, if you [fol. 20] want to call him a novelist—I presume that's where you are building, anyway; and Smollett and Sterne, Edgeworth Fanny Burning. Go ahead.

Q. You testified in answer to a question put over my objection that you regard the book which is in issue here as appealing to prurient interest?

A. That's correct, sir.

Q. What do you understand by the word "prurient"?

A. Do you want to try Webster?

Q. I want to know what you had in mind when you answered the question.

A. Well, I can start with the word "dirty". I can go on with the word "sexual"; I can go on with "esoteric".

Q. Esoteric?

A. Yes. I can add "erotic", in other words, for the purpose of stimulating sexual reactions.

Q. So that if a book could be described as erotic, you would also describe it as prurient?

A. Those words are not synonyms in every case. They may be and they may not be; you have to have a particular incident and a particular case.

Q. Well, could you give me an example of a book that you would regard as predominantly erotic that you would not regard as predominantly prurient?

A. Why, yes. Zola's "Nana".

Q. That book is erotic in the sense that it stimulates a sexual response in the reader, is that what you mean?

A. To a degree, but it has other literary merit. It lifts it up above and beyond the word "prurient".

Q. I see.

A. It is a human document.

Q. Correct me if I am wrong. As I understand what you are saying now, it is that there are books that are erotic in the sense that—

A. Well, now, yes. Certain parts of "The Arabian Nights", for example, may be.

[fol. 21] Q. Certain parts of the Bible?

A. Yes, there are many cases where the words—

Q. The answer was Yes to that?

A. I don't know what the question was.

Q. I said, certain parts of the Bible.

A. Yes. That's an oldie.

Q. But nevertheless true. Well, let me put my question to you again because I am just trying—

A. You are trying to distinguish between the two words, correct?

The Court: Just let him ask the question and you answer it.

Q. I want to know if I am correct in summarizing what you have been saying just now as follows: that there are certain books which you would deem erotic because they stimulate a sexual response in the reader, but which you would not call prurient because they have certain literary merits or literary values?

A. Well, I wouldn't condemn the whole book as erotic. I say there may be passages and parts in it which may be that.

Q. You know you have to consider the book as a whole, so let's say that there is a book that has these passages and

parts which stimulate this sexual response in the reader, but the book also has some literary merit. How do you designate that book?

A. Masterpiece.

Q. You also answered affirmatively to the question whether the book in issue is obscene. How do you define that word?

A. Disgusting.

Q. Obscene equals disgusting?

A. I will go along with that for a while. Go ahead.

Q. You say for a while you will go along with that?

A. Well, if you start refining it, I will have to start refining.

Q. Don't you think we ought to refine these terms? After all, the publication of a book is at stake here.

A. Yes, I understand.

[fol. 22] Q. There are books, of course, and I think you would agree with this—at least I want to know whether you do—that don't treat of sex at all, but which the reader might find repellent or, in your word, disgusting?

Mr. Sullivan: Objection, your Honor.

Mr. Rembar: I am asking if he agrees with this.

Mr. Sullivan: Is this a question?

A. I think the question is a little obscure.

Mr. Sullivan: Is this a narrative or is this an interrogation?

The Witness: I don't understand him.

The Court: I think you better rephrase the question, please.

Q. Do you know of any books that do not deal with sexual subject matter that you could call disgusting?

A. Offhand, I wouldn't say so, no. I don't think that point is at issue, but go ahead.

Q. The judge will decide what points are at issue, but as of now you say that the word disgusting is confined to books that deal with sexual subject matter?

A. For the time being, yes.

Q. And those books you would call obscene?

A. Yes.

Q. Another question to which you answered affirmatively was whether the book at issue is indecent, and I would ask you again what you mean by that word?

A. Well, I would say that it was contrary to public mores, to the customs of the people and the common standards of a given time and a given place.

Q. Tom Paine's "Common Sense", would that fit your definition?

A. I don't think so.

[fol. 23] Q. Another term that was used on direct examination was the term "patently offensive", and you said that this book is patently offensive. Does that have any different meaning from these other words we have been discussing?

A. Well, I believe patently means open, doesn't it?

Q. It means "on the face of it", I think, yes.

A. Offensive—it is merely another way of picturing the same thing. You said that is in a Supreme Court phrase.

Q. In your opinion, is Henry Miller's "Tropic of Cancer" patently offensive?

A. Yes.

Q. Is it indecent?

A. Yes.

Q. Does it appeal to prurient interest?

A. Yes.

Q. Is it obscene?

A. Yes.

Q. When did you read the book in issue last, Dr. Collins?

A. Last night, first and last.

Q. Could you give me a brief recapitulation of the story in the book?

A. Well, I don't see how I could without being patently offensive.

Q. You are in a court of law, Dr. Collins. I am sure you will be excused.

A. Well, autobiography of a girl that comes from the country up to London and gets herself into a brothel and goes through the various adventures of, first of all, Les-

bianism, and with detailed descriptions of sexual actions. That's about all I could find in the book.

Q. Does she ever get out of the brothel?

A. Well, I should say no, she doesn't get out of the problem, no.

Q. Out of the brothel, I said.

A. Oh, yes.

Q. She does. How?

A. Well, originally, she is taken out by one of her customers.

[fol. 24] Q. And what happens then?

A. Well, it goes on the same—

Q. It is not the same. She is out of the brothel now. What does she do?

A. Well, she rides in a coach and so forth and she has various adventures.

Q. Do you recall who it is with whom the heroine has her first sexual encounter?

A. I believe the lady's name is Phoebe, in the very first chapter, as I remember it.

Q. Do you recall at this time that the heroine, correct me if I am wrong, is a very young girl as you said before?

A. Fifteen.

Q. Fifteen. Does she comment on this experience later?

A. She comments on it. One time later she was very grateful to that girl for introducing her to this situation. That's in the early part of the book.

Q. Can you point that out in the book?

A. I haven't got it annotated. I would have to go through the whole book to go after this.

Q. Well, the Court will read the book. It won't be necessary.

A. All right.

The Court: I read the book. Page 16.

The Witness: I took no notes.

Mr. Rembar: Page 16, your Honor, is the page on which the incident occurs. I was asking for a reference supporting Dr. Collins' statement that she is very grateful to this

woman who has taken advantage of her youth. That was the question. I will leave it to your Honor's further examination.

The Court: I recall something; I can't give you the page.

Q. Do you recall, Dr. Collins, that the heroine, thinking back on this incident, refers to it as foolery and resolves to [fol. 25] have no more such experiences in her life?

A. I remember something like that. I don't remember—I couldn't quote it.

Q. How about her first sexual experience with a man? With whom does that take place?

A. Well, some old rake. I don't know whether his name is even in there.

Q. An old rake, you say?

A. An old rake who had—it was not completed, as I remember, on her part.

Q. With whom does she first actually have sexual intercourse?

A. Now, let's see. It was with this young man who rescued her, as it were, from the brothel.

Q. Do you remember his name?

A. No, I don't.

Q. You read the book last night, though?

A. Yes.

Q. Does the book end with Fanny Hill married or unmarried?

A. She was married.

Q. To whom?

A. I don't remember now.

Q. You don't remember?

A. No, not now. I didn't take notes on it.

Q. It didn't impress you, did it, that the man who is her husband at the end of this book is the same young man with whom she had her first sexual experience?

A. Wait a minute. You lost me on that. I think you are right, and that that was supposed to be the moral in it.

Q. The moral in it is considerably more complicated than that.

The Court: Just a moment. Is that a statement, or what is it?

Mr. Rembar: I will withdraw that, your Honor.

The Witness: I tried to find—

[fol. 26] The Court: Just a moment. It was not a question.

Q. You are familiar, are you, Dr. Collins, with The New York Sunday Times Book Review section?

A. Yes.

Q. Do you recall that on Page 2 there is generally a column by J. Donald Adams?

A. Yes.

Q. I would like to ask you whether you agree with this statement by Mr. Adams.

Mr. Sullivan: Objection, your Honor.

Mr. Rembar: I think, your Honor, it is proper cross-examination where a man has given opinion testimony to ask whether he agrees with a published opinion on the same subject.

The Court: It is hearsay, isn't it?

Mr. Rembar: I am merely asking him whether he agrees, besides which, the Supreme Judicial Court, in the Tropic of Cancer case, considered such material admissible and highly relevant.

The Court: I don't think your statement of what appeared in The New York Times is to be considered as evidence. If you just want to test the knowledge of this witness, I will let you ask the question.

Mr. Rembar: I will ask Mr. Sullivan to concede, not the relevance, but the authenticity of this page of The New York Sunday Times Book Review.

Mr. Sullivan: Counsel has gone over this before, your Honor, and I have no objection to the authenticity, that this is a certain page out of The New York Times, but I do wish to enter my objection on its relevancy and materiality.

The Court: Let me see it.

What statement? It is kind of long.

[fol. 27] Mr. Rembar: I was about to read it to the witness.

Shall I point it out to your Honor?

The Court: The whole thing?

Mr. Rembar: Yes.

(The Court reads article silently.)

The Court: This is getting in evidence the opinion of another witness not under oath. I don't think it is proper. It is this witness' opinion of how good Cleland was as a writer, or how bad he was, his belief.

I will exclude it.

Mr. Rembar: May I have an exception, your Honor?

The Court: Exception noted.

Mr. Rembar: In order to save time, I would like to make—

The Court: Offer of proof?

Mr. Rembar: Offer of proof of this and three pieces of documentary evidence as to which I assume the objection of my brother will be the same and the Court's ruling will be the same.

The Court: Of course, what you pointed out was the opinion of somebody else.

Mr. Rembar: Yes, sir.

The Court: You asked that it get in evidence by asking the witness if he agrees with the opinion of that gentleman. I will accept it as an offer of proof, and it may be marked for identification No. 1, offer of proof.

[fol. 28] Mr. Rembar: May I submit a photocopy?

The Court: No objection if it is a photostatic copy?

Mr. Sullivan: No, your Honor.

The Court: The photostatic copy may be received as an offer of proof.

(Photostatic copy of Page 2, The New York Times Book Review, dated July 28, 1963, containing column entitled, "Speaking of Books," by J. Donald Adams, is marked Exhibit 1 for Identification.)

Offer of proof:

Speaking of Books

By J. Donald Adams

Today's column derives from two recent charges of literary obscenity: the first a ruling by the New York State Court of Appeals, by a vote of four to three, describing as "flagrantly obscene" Henry Miller's "Tropic of Cancer"; the second, a similar charge brought by Corporation Counsel Larkin and the district attorneys of the five counties of New York City, against John Cleland's "Memoirs of a Woman of Pleasure," better known to many generations of readers simply as "Fanny Hill." Miller's book led an underground life for 30 years after its publication abroad in 1931; it was not published here until 1961. Cleland's book first appeared in London in 1748 or 1749, and has led a similar life for nearly two centuries. It was first published in this country last spring.

As every reader of current fiction knows, so far as book publication is concerned, the bars are now completely down in the matter of a writer's choice of language. Newspapers and most magazines still exercise, in varying degree, a measure of self-censorship. So do some book publishers, but no four-letter word is banned from publication if the [fol. 29] publisher, whether of newspapers, magazines or books, chooses to pass it. Government censorship enters the picture only when a work is judged to be obscene. In effect, it is not the words which matter, but the intention with which they are used. "Tropic of Cancer" is full of four-letter words, but by a unanimous decision the Supreme Court of California upheld Miller's right to use them because "There is no authority in the court to act as censors of artistic expression."

To my mind, a writer should be free to use any word in the language. Where he uses it, in what circumstances, and how often, are matters on which the ruling must be made by his own taste, or if he has none—as too many writers have not—by his editor, agent, or publisher. The whole

responsibility lies among them, and it is their obligation to exercise it, if official censorship is to be avoided.

So far, the issue seems to be clear-cut. But when we come to the question of what is obscene, the line cannot easily be clearly drawn, if, indeed, it can be drawn at all. There is a strong subjective element here, and what is obscene to you may not be obscene to me. To some persons, certain passages in the Bible are obscene; many schools, wrongly, in my estimation, use expurgated editions of Shakespeare's plays. It is time we were quit of all this Comstockery.

Cleland was not a great writer, but he was a gifted one, and in my belief as much entitled to call himself an artist as Henry Miller. The chief difference between them is that Cleland presented normal sexual relations for what they are—the intensest pleasure man derives from his senses; Miller makes them revolting. I would prefer to have a child of mine read Cleland rather than Miller.

There are, not that it matters, no four-letter words in Cleland. There is characterization which Miller has never achieved; there are sound moral pronouncements, which he has never made. Cleland offers a vivid social picture of his time—overstated at times, to be sure—but which is basically as true as the drawings of his contemporary Hogarth. As Peter Quennel suggests, the book is properly seen as one of the reactions, in an outspoken age, to the sanctimonious, [fol. 30] sentimental and slyly prurient novels of Samuel Richardson, whose "Pamela" provoked Fielding into writing the same story in reverse, "Joseph Andrews"—in which a young man protects his chastity as zealously as Richardson's heroine. Furthermore, Cleland emphasizes the fact that the sex relation, when informed by love, rests on a higher level than when it is a purely animal reflex—a distinction which many of today's novelists decline to make.

So much for Cleland's merits as a writer. And the demerits? He was well aware of the pitfalls waiting for any novelist who writes in explicit terms of physical love—for he says "there is no escaping a repetition of near the same

images, the same figures, with this further inconvenience . . . that the words, joys, ardours, transports, extasies and the rest of those pathetic terms . . . flatten and lose much of their due spirit and energy by the frequency with which they indispensably recur." Many of his pages become wearisome, but one must admit that in stating why they do, he spoke as an artist.

Many of our current writers including Miller, Jones, and O'Hara, might ponder that statement with profit. I agree with Mr. Quennell that Cleland's book "seems to be far less subversive and demoralizing than not a few of its 20th century counterparts," and that in it "we escape the nauseating modern mixture of sexual appetite and criminal violence." I do not deny that "Fanny Hill" can shock some tender sensibilities, but I do not regard it as an *evil* book.

Mr. Rembar: The three other pieces of documentary evidence to which I refer, your Honor, are the October 31, 1963 issue of The New York Review of Books; Page 710 of the New Statesman of November 15, 1963; and a page whose number I do not have, of the issue of TIME Magazine of August 2, 1963, headed "Modern Living".

Mr. Sullivan: May we just take these down, your Honor, so we will have a record?

The Court: Do you have objection to their admission?

Mr. Sullivan: I have, your Honor.

Mr. Rembar: Exactly the same offer and objection.

[fol. 31] The Court: This one in The New York Review is an opinion of a writer concerning the book who is not present in court. It is hearsay. I will exclude it, and to that you take an exception?

Mr. Rembar: Yes, sir.

The Court: That may be marked for identification as part of an offer of proof, No. 2.

(Article entitled, "The Harlot's Progress", by V. S. Pritchett, contained in the October 31, 1963 edition of The New York Review of Books is marked Exhibit 2 for Identification.)

Offer of proof:

The Harlot's Progress

V. S. Pritchett

Memoirs of a Woman of Pleasure by John Cleland. Putnam, 319 pp. $6.00; paperback $.95

Every age gets the pornography it deserves. The people who are now making a fuss about Fanny Hill, John Cleland's *Memoirs of a Woman of Pleasure,* do nothing about the real pornography of today—the incitement to violence, torture, maiming, and killing, often topped up with sexual perversity, which are presented with a sickening kind of pleasurelessness, on the screen of television and cinema and in pulp fiction. It can be suggested (as Havelock Ellis once did) that some kinds of pornography are socially useful; they may allay evil desires by acting as a sort of imaginative distraction. They may lead us away from action into harmless fantasy. Whether this is so or not, the real test is not what the average man thinks; it is the test of artistic merit, and if he is called upon to judge, it is the average of man's duty to find out what artistic merit is. He will find himself considering man's often brilliant exploration of his own imagination. Nothing could be more horrifying and inciting to sadistic action than those terrible pictures of Goya's called "The Fantasies" and "The Disasters of War"; however, one sees, at once that Goya's art transmutes them and places them in that area of our minds where the difficult but indispensable moral and civilizing process can operate. The [fol. 32] same transmuting process can be seen in the treatment of the classical but surely sordid encounter of Leda with the Swan; in the brothel paintings of Toulouse-Lautrec, in the pathos and laughter of Maupassant's "Maison Tellier." I believe one can see it also in that minor amatory exercise, "Memoirs of a Woman of Pleasure". No one is asked to say *how* meritorious an artist is in these matters, but it is essential for the transmutting element to be recognized.

Since 1749 when it was first published in London, many sensible people have thought that "Memoirs of a Woman of Pleasure," usually known as Fanny Hill, had this element. It has its place in the history of literature, not in the history of smut. Smut never lasts. The story is obviously inflaming, but even "Jane Eyre" or "Lorna Doone" inflames. Fanny, a country girl abandoned in London, describes how she enters a select brothel—note the word "select"—and goes into prolonged, detailed descriptions of several kinds of sexual adventure and intercourse. In doing so, however, she never utters an obscene word, rarely descends even to colloquialism, never to the clinical; she indeed writes an elaborate literary language that would do credit to any master of baroque and poetic utterance—shall we say Henry James?—spoken in a drawing room. And it is not shabby baroque. The disconcerting thing about the book—as a piece of "pornography"—is that it has charm. Many have thought the intercourse of the sexes brutal even when blessed by the Church; more refined and indeed naturally sensitive or passionate people have found the very opposite. Fanny belongs to the latter category. She is healthy, warm-blooded, delights in her senses, is unashamed in curiosity, and is distinctly self-aware. She is unrepentant in pleasure or lust; but she truthfully perceives—and this, I believe, without the sort of hyprocrisy that greater writers like Defoe or Richardson insinuated—that she had physical pleasure in lust but physical spiritual pleasure in love. Having made a lot of money in her enforced profession about which, in the true practical spirit of the eighteenth century, she is complacent, she marries her first lover: a success story that can be said to be a smack in the face for Clarissa or Pamela.

No one pretends that John Cleland approaches the range or power of Defoe or Richardson as a novelist. His book is, [fol. 33] on the other hand, the nearest thing we have to an English "Manon Lescaut". But he must be seriously discussed with these writers by the literary critic, for he brings to life an important element in eighteenth-century

morality and feeling. Two influences clearly bear on his mind. The first is accidental. Residence in Smyrna as British Counsel and later in Bombay appears to have removed from Cleland the morally ruthless, brutal, or comic-brutal attitude to sexual life which is so strong in the aggressive Anglo-American traditions. (Charm, tenderness, a concern for manners in love are pronounced in Oriental works like "The Arabian Nights" and, despite the clinical dog-Latin of timid translators, in "The Golden Lotus".) But the strongest influence on Cleland is that concern for the reform of manners which is the most powerful force in the English novel during the eighteenth century.

Part of this spirit of reform was the expression of Puritan ambition or—more accurately—of the beginnings of middle-class respectability; it began under William III who, like most Dutchmen of that time, was appalled by the barbarity of English social life. The other part was directed to polish, elegance, the refinement of sensibility, and making men and women physically clean and conversible. In the end, the former hardened into hypocrisy and the latter into arid artifice and eventually false sentiment. Especially does the spirit of reform, and the social revolution accompanying it, affect the status of women who begin to emerge as the custodians of society and, at last, of their own persons. Defoe's Roxanna becomes a greedy kept mistress, because she is determined to be as free as any merchant and to be as much master of her person and property as any man. Defoe's Moll Flanders, thief and doxy and calculating fornicator, sins for one motive only: to attain respectability. She ends as the first Mrs. Grundy of Virginia. Her morality and remorse—like Mrs. Grundy's—are amiable but suspect. Though frank about their sexual experiences, these ladies take it as it comes and are incapable of describing their inner life.

It was more profitable, as Mr. Peter Quennell says in his excellent introduction, to compare Fanny Hill with Richardson' heroines Pamela or Clarissa; and also to compare Cleland's moral attitude with the Hogarth of "The Harlot's Progress". The moral of Pamela is that lovely woman must

not stoop to folly; if she does, she will miss both respect-[fol. 34] ability and property. The moral of Clarissa is "Better death"; and of Hogarth's pictorial chronicle, that a life of libertinage leads to self-destruction. To these violent and general views, Fielding was the aristocratic objector. It was notorious (a large body of non-Puritan opinion agreed) that a life of pleasure did *not* automatically lead to disaster; that the virtuous Pamela was a sham; and even that Clarissa was one of those peculiar psychological aberrants who are contented with nothing short of rape. Like Fielding (in this way at least), John Cleland holds to the view that manners can be reformed only if one is truthful about private experience and cultivates one's perceptions and good sense. His story may be shallow, but its content, within its limits, is not.

To this attitude Cleland adds his own eccentricity as a writer. He was a bookish Scot with a Celtic bee in his bonnet. He is eccentric to the point of ridicule. It is true he was a down-at-heel Bohemian who wrote his sensational and daring Fanny Hill to make a quick twenty guineas, when he was bankrupt; yet his real interests were esoteric and solemn. His hobby-horse was not sex but philology. He sought to found a universal language and wrote a "Specimen of an Etymological Vocabulary or Essay by means of the Analytic Method, to retrieve the Ancient Celtic."

Mr. Quennell quotes a long passage from this obscure essay, which is dotty but reveals an obsession with the metaphysics of the art of description. Here is a sample of Cleland's groping mind:

> "*If* then, I repeat it, *if* I am not mistaken in this method of analysing words by an individuation of ideas, syllable by syllable, and through every particle that constitutes those ideas . . by means of which the existence of things may be found in their natural records and repositories, words satisfactorily explained so as to convey undeniable truths by implication . . ."

If that particular passage suggests anything it is a fervid preoccupation with metaphor and the associations of words poetic or otherwise—which is not, when one comes to think of it, extraordinary in an eloquent Celt—that inspired the florid and indeed the best passages of sexual description in the book. The evocation of what sexual pleasure is in its [fol. 35] particularity and in the imagination, was his strong point. There he succeeded where better and higher-minded writers—D. H. Lawrence among them—have grotesquely failed. Cleland is good about sex because he is good about words. Elegance, energy and kindness, he conveyed.

The absurdity of Fanny Hill lies here also; where "pornography" does not brutalize, it idealizes. The book is, in this sense, an erotic fantasy—and a male fantasy, at that, put into the mind of a woman. The male organ is phenomenal to the point of absurdity. Cleland is carried away by his sexual daydream. So was Casanova, most of the time, for eroticism is a kind of intoxication. But we must remember that Fanny Hill was a sensational book, written as a sensational counterblast from the point of view of privacy to those who were formulating the new public bourgeois attitude to sex. In one sense Cleland is engagingly feminine; the continual reference to clothes, to furniture, to manners is that. But Cleland has the naive male double view that old whores are hardened and corrupt but that young ones, though on the make, are also rescuable—not by pious interference, but through the experience of love. On the whole, one would guess that Hogarth's view of the bagnio was the correct one; for we notice Cleland is a snob; his brothel is that fantasy, the select brothel with no risk of the eighteenth-century nightmare, the pox; but is odd that Cleland, who was either wrong, exalted, or cynical, should have had a finer and far less gross sexual sensibility than Hogarth—except possibly in one or two gory sadistic metaphors and in the disagreeable flagellation scene. If that disgusts, it at any rate shrewdly exposes the psychological distress of the neurotic.

Fanny Hill may bore one—she admits that an ecstatic story like hers may become tedious because there is nothing so tiring as repeated ecstasy—but she leaves no bad taste. If we don't believe her fairy tale, we believe her feelings. Indeed she conveys the sense of pleasure without guilt. (There, alas, she is no realist.) After the eighteenth century, a book like this could not be written in England. Romantic morality reasserted itself and sexual happiness retired from print into privacy and, indeed, one does not want this private mystery to be exploited or described too often, even by the gifted.

[fol. 36] After publication, the real pornographers got to work on Fanny Hill. The book was pirated. The pirates supplied obscene illustrations. (One set of these by Cruikshank must have been good, but it has been lost.) They dirtied the text, added episodes. The illustrations led to prosecutions. But as a minor fantasy, deluding as a guide to conduct, but respectful of our delight in the body, this half-sly, half-ingenuous manual is an interesting footnote in the history of the English novel. It reminds one of those improper carvings one sometimes finds under the arms of medieval choir stalls. Immodestly the flesh happily persists.

The Court: I exclude this opinion of this book found in the "New Statesman" as purely hearsay, opinion testimony, the author not in the court. Do you except?

Mr. Rembar: Yes, your Honor.

The Court: Exception noted. Do you offer that as an offer of proof?

Mr. Rembar: Yes, your Honor.

The Court: It may be marked Identification No. 3.

(Article entitled "Mersey Sound, 1750", by Brigid Brophy, from the November 15, 1963 issue of "New Statesman", page 710, is marked Exhibit 3 for Identification.)

Offer of Proof:

Mersey Sound, 1750

Brigid Brophy

To my mind, the two most fascinating subjects in the universe are sex and the 18th century. Anyone who so much as partly shares that persuasion would expect "Fanny Hill", as a cardinal source-book for both subjects, to be an interesting document. An interesting novel, however, [fol. 37] you would not expect, if you judged by the run of minor 18th-century fictions or, still less, by the run of famous naughty books. As a rule, if there's anything drearier than smut, it's old smut. When "Fanny Hill" turns out to possess, over and above the interest of its material, literary charm, that seems almost too bonus to be true. It is in fact a highly engaging little erotic tale—perhaps the most engaging emerge from the entire 17 centuries of European literature that lie between "Daphnis and Chloe" and "Claudine a l'Ecole".

Not that there could be an instant's doubt which of the 17 "Fanny Hill" belongs to. Tone, tenor and preoccupations, to say nothing of the heroine's first name, are all so dead-central to the period that it is by an accident of poetical precision that the book was published slap in the centre of the century, in 1750 itself. No more can one doubt that John Cleland's (quite legitimate) purpose was to entertain and get paid for doing so. He neither aims at nor achieves a masterpiece. When he touches art, which is quite often, it is of a truly artless kind; he is not even trying, in the fashion established, soon afterwards by Greuze and towards the end of the century transplanted into literature by Bernardin de Saint-Pierre, to be artless.

That, given the period's wrongheadedness about art and artlessness alike, is to Cleland's advantage. The literary masterpieces of the 18th century were produced against the grain of a philosophy convinced that imagining was less useful than moralising, and often against the grain of the author himself. The century's greatest poet could actually, looking back in admiration to the primitive Golden

Age, count among its glories that it had no arts. Laclos cast "Les Liaisons Dangereuses" in the flippant convention of an erotic novel with a perfunctory punishment of vice appended. The result is that we have only just noticed that it is a great novel, and have still not wholly taken in that it is one which turns its convention upside down—not an erotic but a thanatic novel, whose ending, so far from being an appendage, is the tragic doom towards which the characters unconsciously drive themselves all along. Cleland's talent, quite lacking the stamina of Pope's or Laclos', could never have stood out against the exceptionally marked and uniform grain of his age. Had he at- [fol. 38] tempted high art, he would have got trapped in the marmoreal toga-folds of the 18th century elevated manner. He is saved because, unlike Laclos, he *is* writing an erotic novel. He can skip the elevation and get on with the erections. 'I skip over, Fanny frankly writes, 'the natural grief and affliction which I felt on this melancholy occasion'—that is, 'the loss of my tender fond parents'. Likewise she will 'skip over all that happened to me on the road'—the road, that is, conducting her to London and prostitution from her poor but respectable birthplace near Liverpool.

Cleland's immediate model is "Clarissa", whose final volumes had appeared the year before. He adopts the standard epistolary form, but with no attempt at verisimilitude, let alone at providing a textbook of epistolary etiquette. He simply splits his novel into two 'letters': each is framed in a couple of merely formal, though pretty, colophons in the shape of an introductory 'Madam' and a concluding "I am, Madam, yours, etc." which are addressed to an anonymous friend to whom Fanny has promised an account of 'the loose part of my life, wrote with the same liberty that I led it.' Having tidied away the paraphernalia, Cleland is able to get on with a remarkably uncluttered narrative line; indeed, he gets Fanny to London, and places her, penniless and friendless, at the mercy of a brothel-keeper, in about as many pages as it takes Richardson volumes to get Clarissa into the same fix.

In outline, Fanny's story apes Clarissa's; but where Richardson, a proto-Sade but less frank, presides sanctimoniously over his heroine's long-drawn degradation, Cleland and Fanny are cheerful. The opening discloses the end will be happy, and in fact everything between is arranged in a manner thoroughly agreeable to Fanny. Quickly escaping the nasty procuress, she takes up with—indeed, falls more than a touch in love with—one who is kind, deals fair financially and tenderly suffers her girls to have none but gentle and sexually attractive clients. The most remarkable thing about these 'memoirs of a woman of pleasure' is that the pleasure concerned is Fanny's. She may be bought, but she is no inert bit of goods. Her 'downfall' is really one long delightful swoon into the depths of pleasurable sensation—which Cleland has her describe in vigorous and often beautiful metaphorical language; by her own account, her subject is 'properly the province of poetry, nay, is poetry itself'. The emergence of the 18th-century heroine, explaining herself [fol. 39] in the novel through letters and in the opera through arias, reflects that women had emerged into social articulateness. No longer mere objects of men's pleasures, they can themselves be pleased and say so. A whole public—including the women themselves—was demanding to be told what *did* please women. Cleland's was perhaps the most explicit answer.

True, the century had 'defloration mania', and Cleland caters for it. The parlour game of Fanny's fellow-prostitutes is to swop accounts of how they lost their virginities; and Fanny's own history is a prolonged defloration. It begins at the hands of a prostitute, and proceeds to the loss of her visual innocence when she spies on sexual encounters; even after her first lover deflowers her, it remains for a lover more ithyphallic to enlarge the result; even then, with the help of stage-property blood, Fanny fakes up a maidenhead to have it destroyed all over again by a client whose particularity that is. She undergoes yet another 'initiation'—into a society of four couples who take turns at coupling in front of the others. There fol-

lows Fanny's systematically progressive initiation into variations and perversities; and at the last Cleland still has an ironic conceit up his sleeve whereby Fanny, reunited and about to be married to her first love, comes to bed as blushingly as a virgin, though her blushes are now for her non-virginity.

Yet all these pangs of defloration are in the service of erotic pleasure—Fanny's and the reader's. Postponing the culmination of Fanny's deflowering is equivalent to postponing the point where the reader has a mental orgasm. By fulfilling the requirements of the erotic novel, Cleland produced an article rare in the 18th century, a full-length (which Voltair's are not) prose narrative where the climaxes are cumulative instead of cancelling out. Fanny herself propounds the literary problems: to avoid at once gross language and 'mincing . . . affected circumlocutions'; and to introduce variety into subject-matter 'eternally one and the same'. Surmounting these problems, Cleland arrived at the craft of the well-made novel. It is all the same craft, whether the novel is erotic or non-erotic; and to a large extent it is the same craft as that of the well-[fol. 40] made erotic daydream. Cleland's narrative, in which all inconveniencies—including the very possibility of pregnancy—are simply swept out of consideration, is purest daydream. Its content could not possibly shock anyone who has ever led a fantasy life.

Eighteenth-century philosophy had, like Fanny herself, recognized pleasure as nature's 'principal end'. Cleland is simply practising what Edward Young preached, that 'Pleasure is nought but virtue's gayer name'. Fanny finally opts for virtue in the form of true and singleminded love, but without, as she rightly claims, hypocrisy: she simply finds love ultimately more pleasurable, and wastes no regret on a past which has only the better equipped her, in experience and money, for love.

Her progress is sprigged with the pleasure-motifs of the age. Fanny is Johnsonian in devotion to London, and Evelin-like in contempt for provincials. The story's one

excursion out of town echoes "The Rape of the Lock" in being 'a party of pleasure . . . up the river Thames'. Cleland imports no realistic exoticism from his life in Bombay or as consul in Smyrna. He uses only the fashionably exotic slang of calling a brothel a seraglio. That and the 'ceremonial of initiation' which Fanny undergoes fore-echo Mozart's themes—and even his serious social intent. Like "Die Zauberflote" itself. "Fanny Hill" sketches an ideally benevolent society, albeit in a brothel. Jealousy is drowned in a diffused bi-sexuality; even the constant voyeurism, practised through an implausible quantity of cracked panelling, symptomises an attempt to render sex sociable.

Opera is, as a matter of fact, one of the motifs which Cleland's mind, running so true to the age, leaps at for a metaphor of sexual 'harmony and concert'. The female body he maps according to the great minor art of the age, landscaping. It is to Watteau's landscapes that he casts back when Fanny calls sexual intercourse 'our trip to Cythera'. Indeed, Cleland's couples share with Watteau's a grave elegance and a courteous concern for each other. Even when the four pairs take turns on the couch, 'good manners and politeness were inviolably observ'd'. Cleland himself is as decent. Mercifully *not* 'robust', or Row-[fol. 41] landsonian, he is decorous not merely in vocabulary but down to the last cadence of his fine, plain prose.

Cleland does not achieve the imaginative world of a Watteau or a Tiepolo; his is the fantasy world of a decorative painter. The entire novel might be taking place, like his pleasure-party in a pavilion whose 'marquise' is 'figur'd with fluted pilasters . . . the whole having a gay effect upon the eye, wherever you turn'd it.'

The Court: I will exclude the Time Magazine article. I read that before; you have it in the back of your brief, haven't you?

Mr. Rembar: Yes.

The Court: I will exclude that as the opinion of someone else not in court, and exception noted.

Exception taken, and exception noted.

That may be accepted as Identification 4 in an offer of proof.

(Item bearing sub-heading "Taste" under the heading "Modern Living" from the August 2, 1963 issue of Time Magazine is marked Exhibit No. 4 for Identification.)

Modern Living

Taste

Ye Olde Sex

Just when it was becoming fashionably sick, someone had to come along and remind everybody that sex can be fun. The contemporary five-foot shelf abounds in incest, lewd vagrancy, homosexual hankypanky, reckless driving, and other suburban indelicacies. Such misdemeanors seem thoroughly neurotic compared to the plain if repetitive dalliance of Fanny Hill, heroine of John Cleland's [fol. 42] "Memoirs of a Woman of Pleasure," originally published circa 1749 and widely accredited as the first deliberately dirty novel in English.

Last week in Manhattan, after hearing arguments on two injunctions to ban sale and distribution of the book (in a new edition by G. P. Putnam's Sons), Justice Charles Marks of the New York State Supreme Court ruled that Fanny is indeed obscene.

The United States Supreme Court has held that the test for obscenity is "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest." Said Justice Marks: "The opinions of authors and critics cannot be substituted for those of the average person in the contemporary community. Neither the quality of the writing nor the so-called literary worth of the book prevents the book from being adjudged obscene."

A Patchwork Past. The rough handling in court was not Fanny's first setback. In 1821 a racily illustrated edition won fame up Massachusetts way, in what is generally regarded as the first recorded case in the U.S. of suppression of a literary work on grounds of obscenity. Her

second-class status thus established, poor Fanny found that the boys just wouldn't leave her alone. Like her sister-in-arms, "Lady Chatterley," she has been dog-eared, passed around, pirated, smuggled, disguised in "Franny and Zooey" jackets, and buried under musky sweatshirts in prepschool locker rooms the world over.

Author Cleland, the never-do-well bohemian who first put "Fanny" between covers, wrote the book because he needed money, but sold it for a mere 20 guineas. He thereafter pursued his passion for philology and died a scholar. His publisher, made rich by reprints, died a proper gentleman.

As her story begins, Fanny is a 15-year-old Lancashire lass who arrives in London and promptly falls into the clutches of a sportinghouse madam. Her subsequent adventures are detailed in prose that misses nary an 18th century curlicue. Of one memorable orgy for eight, she [fol. 43] relates: 'It is to be noted that, though all modesty and reserve were banished from the transaction of those pleasures, good manners and politeness were inviolably observed; here was no gross ribaldry, no offensive or rude behavior, ungenerous reproaches to the girls.' After enjoying many another 'well-breath'd youth, hot-mettled, and flush with genial juices,' Fanny finds true love and kisses the oldest profession goodbye.

Enjoying It Less. Perhaps the most damaging case against pornography is stated by Fanny herself: its greatest offense is tedium. She begins her second letter saying: 'I imagined, indeed, that you would have been cloy'd and tired with the uniformity of adventures and expressions, inseparable from a subject of this sort, whose bottom, or groundwork being, in the nature of things, eternally one and the same.'

True enough. But in an age when even serious authors treat the sexual act in terms of a case history or social protest (and the Olympia Press's professional pornographers are driven to exploit De Sadean whips, chains and intricate multiple interlacings to keep ahead of the uncen-

sored press), Fanny Hill's straightforward heterosexuality must come as a shock. None of her escapades, for instance, are as unsavory as the AC-DC boy-meets-boy encounters of James Baldwin's "Another Country," nor are they as grubbily explicit as the climactic sexual passage in Updike's "Rabbit Run."

Certainly Fanny was no common harlot. Her "Memoirs" combine literary grace with a disarming enthusiasm for an activity which is, after all, only human. What is more, she never uses a dirty word.

Mr. Rembar: There is an exception to each of those rulings, I take it?

The Court: One of them you didn't make, but I made it for you. I saved your exceptions; you are protected all around.

Mr. Rembar: I have no further questions of this witness.

The Court: Any further questions of this witness?

[fol. 44] Mr. Sullivan: I have nothing further, your Honor.

That is the petitioner's case, your Honor.

The Court: Petitioner rests.

Mr. Rembar: If the Court please, before I call my witnesses, I would like to make a brief statement.

I objected to the eliciting of testimony on the part of Dr. Collins because, as I contend, the questions asked were all questions that required a legal conclusion in order to be answered. I will not argue that point further. Your Honor has ruled and my brief deals with these matters.

I did not object to the question addressed to Dr. Collins as to whether in his opinion the book has or lacks literary merit. That kind of question—

Mr. Sullivan: May I interrupt, your Honor?

The Court: What is this, an opening?

Mr. Sullivan: Are you opening your own case or—

Mr. Rembar: Yes.

Mr. Sullivan: —or pulling mine apart at this stage?

Mr. Rembar: I beg your pardon?

Mr. Sullivan: I don't quite understand what the point of this is.

Mr. Rembar: I want to distinguish between the type of testimony to which I object and the type to which I do not object.

Mr. Sullivan: Your Honor, please, I believe this is a matter for argument.

[fol. 45] The Court: Yes. This is an opening statement at the conclusion of the petitioner's evidence.

Our practice here is, if you make an opening statement before you present your evidence, it is usually a statement of what you intend to prove and what you intend to show.

Mr. Rembar: I would have arrived at that in the very next sentence, your Honor.

The Court: All right.

Mr. Rembar: The witnesses whom the publisher, as intervener, will call will testify in the main to the issue last described, that is to say, whether the book in issue has or has not literary merit or other social values.

I would point out that in the case of Attorney General vs. A Book Named Tropic of Cancer, the Supreme Judicial Court of this state held that the presence of such merit or other values excludes the possibility that a book can be held obscene.

I call Professor Stocking.

Fred Holly Stocking, Sworn

Direct examination.

By Mr. Rembar:

Q. Would you give your full name, please, sir?

A. Fred Holly Stocking.

Q. What is your occupation, Mr. Stocking?

A. I am Professor of English and Chairman of the English Department, Williams College, Williamstown, Mass.

Q. How long have you been teaching English?

A. Since 1937.

[fol. 46] Q. Have you covered a wide range of English literature?

A. Yes, sir, from—generally, I have taught courses from Chaucer to the 1930's.

Q. Are you familiar with the book in issue in this case?

A. Yes.

Q. Would you please state your opinion about merit or lack of merit in this book?

Mr. Sullivan: Objection, your Honor, to the form of the question. What manner of merit?

Mr. Rembar: I didn't say manner.

The Court: Are you objecting on his qualifications?

Mr. Sullivan: No, to the form of the question.

The Court: All right; qualifications are admitted. First, determine whether he has an opinion on whether this book has any literary merit.

Q. Do you have an opinion, Mr. Stocking, as to whether the book in issue has literary merit or other value?

A. Yes.

Q. Would you state that opinion, please?

A. I think this book has literary merit because, first of all, I think it is a work of art. That is to say, I think it asks for and receives a literary response as distinct from a non-literary response.

I think it is, like all pieces of literature, essentially an act of contemplation, and an act of contemplation presented through a story that is presented in an orderly and organized fashion, with a fictional central character, and with a literary style that is definable and commendable.

I think the central character is presented as a person who, at the time of writing these words, is essentially what I call [fol. 47] an intellectual. By an intellectual, I mean someone who is extremely curious about life and who seeks with objectivity and detachment to record with accuracy the details of the external world, physical sensations, psycho-

logical responses, who makes an attempt to generalize on experience for patterns in experience and to articulate and formulate those patterns, and who likes to, endeavors to, arrive at certain conclusions about experience.

This character is essentially, in my opinion, an empiricist who does arrive at certain conclusions, certain conclusions about moral values, certain conclusions about the nature and high value of temperance, certain conclusions about the value of the life of the mind, who arrives at a clear intellectual distinction between the nature of love and the nature of lust.

The intellectuality of this character is made clear to me from the opening page by the prose style, which is ceremonious, formal, consciously formed, and in a way that I find pleasureable and highly artificial. This establishes the air of detachment from the beginning.

I think furthermore that it is a remarkable piece of imaginative projection. It is extraordinary that a man could project himself into the mind of a woman in as precise and vivid a way as Shakespeare has projected himself into the minds of women and kings and bums and all sorts of personalities which must have been in many ways different from Shakespeare's own.

I find this a structured novel which follows a definitely progressive pattern. I find it a novel which offers that kind of vicarious experience and the conclusions one can derive from vicarious experience which one cannot derive from one's own experience.

Furthermore, with the authority of Mr. Quennell, who is an authority on the 18th century, I find that this tells me things not only about human nature but about the 18th century that I might not otherwise know.

Q. Who is Mr. Quennell?

A. As I understand it, Mr. Quennell is a scholar who has written considerably about the 18th century. I would say [fol. 48] he is a semi-popular writer whose writings are based on very sound scholarship which he wears very lightly.

Q. This is the Mr. Quennell who is the author of the introduction?

A. Yes.

Mr. Rembar: That's all.

Cross examination.

By Mr. Sullivan:

Q. Where were you educated, Doctor?

A. I graduated from Southeastern High School in Detroit. I got my B.A. from Williams College, my M.A. and my Ph. D. in English from the University of Michigan.

Q. How long have you been at Williams as a professor?

A. Since 1940. That is, I was a member of the faculty. Professor isn't the word for that entire time.

Q. Member of the faculty?

A. Yes.

Q. That's what I mean. I am very pleased to meet you. I am sure you are a distinguished scholar.

A. Thank you.

Q. Now, you said "on the very first page of this book." I assume you are not talking about Mr. Quennell's introduction, you are talking about the substance of Cleland's publication?

A. That's true.

Q. You say that the prose style connotes a certain type of character, do you not?

A. That isn't exactly what I said. I said it denotes a character who has achieved a certain capacity for organizing experience, a certain detachment.

Q. That's the character of the author?

A. No, the character of Fanny Hill, who is the speaker as distinct from the author.

Q. The heroine, as Mr. Rembar has described her?

A. Heroine was his pronunciation.

[fol. 49] Q. I am very sorry. What kind of a character did Fanny Hill have, Doctor?

A. At the time she is writing these words, she had a character of a person who has had a great deal of experience, who has lived life with great gusto and with a great interest in it, and is now trying to formulate her experiences in the past.

Q. As portrayed by Mr. Cleland, as he wishes to portray them, is that so?

A. He has her portray herself, yes.

Q. Through the book itself, would you describe Fanny's character for me?

A. I have described it. I will repeat this description, if you like. She is a person who lives with great zest, who is interested in experiences, who is not offered an opportunity to have a very wide range of experiences, but, within the narrow range of experiences that life offers her, she tries to arrive at certain conclusions about life and to make certain generalizations.

Q. She doesn't have the opportunity to have a wide range of experience?

A. Her economic and family circumstances determine this, to a large extent.

Q. What family, Doctor?

A. Family that she didn't have.

Q. Does she have a family?

A. That she didn't have. Her lack of family would be a better phrase.

Q. You have recited that she has had certain experiences and has a zest for life. These experiences, do they include Lesbianism in the book?

A. Yes, an experience with Phoebe. She is an extremely innocent girl at that time. She certainly wouldn't be able to identify it as Lesbian, but we in later age can use this word for that experience.

Q. Do these experiences include sexual intercourse?

A. Indeed they do.

Q. And endless experiences of sexual intercourse?

A. No.

[fol. 50] Q. Within the bounds of the book?

A. There are many points in the book in which she is not engaged in sexual intercourse, but reflecting on her experiences, talking with other girls.

Q. But in reflecting on the experiences, and the explanation of the experiences as they take place, they all involve at that point sexual relationships?

A. No, they do not involve sexual relationships.

Q. When you take out those that do not involve sexual relationships, how many pages of this book do you think you would have left?

A. I would have to go through it and do this.

Mr. Rembar: The book speaks for itself, your Honor, on this. I don't think the witness can be expected to count pages.

Mr. Sullivan: He has said they do not all—

Mr. Rembar: That is his answer.

The Court: I will permit the examination.

A. Do you want me to cite an example of a page that is not about sexual experiences?

Q. No, I will ask the questions.

A. All right.

Q. Is there any depravity in this book, Doctor?

A. Yes, I think there are one or two experiences which, if they occurred in real life, would be regarded by a normal person as depraved, and she learns from both normal, if that's the appropriate contrasting term, experiences and from depraved ones. I think the flagellant episode is the clearest example.

Q. The whipping?

A. The whipping episode.

Q. Is there any homosexuality?

A. There is a reference to a homosexual episode and, in this edition, it is not described in detail.

[fol. 51] Q. It is not? Have you read the paperback or just the hard cover?

A. I understand they are the same. This is the book that I have read (indicating).

Mr. Rembar: They are the same in that regard.
Mr. Sullivan: I have a specific page in mind.

A. I understand that there is a passage that the editors believed a later publisher inserted and therefore was not written by Cleland, but does occur in some 18th century editions of this book.

The Court: We are only interested in this particular book that is in litigation here.
The Witness: The particular episode I have in mind is the one in which Fanny is disgusted by what she sees.
Mr. Sullivan: That is what I have in mind.
The Court: I didn't hear you.
The Witness: I said, the passage I have in mind is the one in which Fanny expressed disgust at what she had seen. The actual episode itself, I said, is not presented in the detail that the other episodes are presented.
Mr. Sullivan: I had for reference, your Honor, a book that Dr. Collins read and it was somewhat different from this.
The Witness: I have only this Putnam edition which you have before you.
Mr. Rembar: 256 and 257 in that book; 181, 182 in that book.
The Court: What is this, a homosexual incident?
The Witness: Would you like to have me read this?

[fol. 52] Q. I would be pleased to have you read it, beginning here.
A. The passage I have in mind:

> "The criminal scene they acted, I had the patience to see to an end, purely that I might gather more facts and certainly against them in my design to do their deserts instance justice; and accordingly, when they had readjusted themselves, and were preparing to go out, burning as I was with rage and indignation, I jumped down from the chair, in order to raise the house upon them, but with such an unlucky impetuosity, that some nail or ruggedness in the floor caught my foot, and flung me on my face with such violence that I fell

senseless on the ground, and must have lain there some time e'er anyone came to my relief; so that they, alarmed, I suppose, by the noise of my fall, had more than the necessary time to make a safe retreat. This they effected, as I learn with a precipitation nobody could account for, till, when come to myself, and compos'd enough to speak, I acquainted those of the house with the whole transaction I had been evidence to."

That was the paragraph I had in mind.

Q. I had in mind this particular one (indicating).

A. "For now the elder began to embrace, to press and kiss the younger, to put his hands into his bosom and give him"—

The Court: Do we need to have this read in? The whole book is in evidence.

Mr. Sullivan: No, we don't, your Honor.

The Court: You just put in the record what particular page you want the Court's attention called to.

Mr. Sullivan: In Exhibit A, it would be at pages 181 and 182, your Honor.

The Court: That is the homosexual incident.

[fol. 53] Q. You earlier stated, Dr. Stocking, that this was a portrayal of an act of contemplation?

A. Yes.

Q. What did you mean by an act of contemplation?

A. Any literary work is an act of contemplation in that a literary person contemplates in terms of character, story, episode, as distinct from a philosopher who contemplates in terms of abstract proposition, the mathematician in terms of mathematical symbol, and so forth.

Q. Is it not true that there are repeated and vivid descriptions of sexual intercourse in this book?

A. That is true.

Q. Would you call those descriptions normal sexual intercourse descriptions?

A. The descriptions are normal descriptions—I want to make sure what you are asking me about—except that this

recorder is more accurate, precise, and orderly than most of us are able to be in our reports.

Q. He is accurate, Doctor?

A. He gives the illusion of accuracy. I don't know how it feels to be a murderer, but when I read what a fellow says about how it feels, I get the illusion of accuracy.

Q. Then it is an illusion of accuracy?

A. Every piece of literature creates an illusion.

Q. There is also in this book depravity, you have stated?

A. There are descriptions of one or two episodes which a person, if he encountered them in real life, would describe as depraved.

Q. And homosexuality?

A. There is a description of an episode, a brief description of an episode of homosexuality.

Q. And Lesbianism?

A. There is a description of something that you and I could recognize as Lesbianism.

Q. Are such descriptions obscene, Doctor, by your definition?

A. By my definition, they are not obscene because they are subordinate to an interest which is primarily literary, [fol. 54] whereas an obscene piece of literature has an interest which is primarily to arouse sexual passion in the reader.

Q. Does not this book give rise to sexual passions in the reader?

A. Individual passages of the Bible, of Shakespeare's plays, and—

Q. I wish you would answer my question.

The Court: Answer the question.

A. Individual passages do, of course.

Q. Percentagewise, in the book itself, what proportion of this book is devoted to depicting sexual relations of one kind or another?

A. I am sorry; I am unable to make a statistical answer.

Q. In your opinion, a rough estimate, Doctor?

A. In my opinion,—

Mr. Rembar: Your Honor, here again, the book is in evidence. I don't see what this witness' estimate of the proportion will add to the facts.

The Court: I will allow the question.

The Witness: Will you state the question again?

The Court: How much of it relates to these incidents and how much does not?

Mr. Rember: I would like an exception, your Honor.

The Court: It is admissible.

Repeat the question to the witness, please.

(Question read by the stenographer.)

[fol. 55] Mr. Rembar: Your Honor, I would like to make an objection on further ground. It is now very well settled that a book must be considered as a whole. It is not permissible to take parts of it, or fractions of it, or individual passages. The question is irrelevant under the present state of the law.

The Court: I deny your objection.

Mr. Rembar: Exception.

The Court: It adds up, and the test is for me to consider the whole, not the witness.

The Witness: Judge, if I may say so, my definition of obscenity is with reference to the whole.

Mr. Sullivan: May the witness answer my question, your Honor?

A. I do not know what proportion.

Q. Could you make an estimate, Doctor? More than half?

A. This is a question of—

Q. Depicting—

A. The subject matter, not the way in which the subject matter is presented; I am just trying to get clear about the question.

Mr. Rembar: Is it understood I have a continuing objection?

The Court: No.

Mr. Rembar: I object to this question.

The Court: The last question, "Is it more than half?" Object to that question?

Mr. Rembar: Same objection.

[fol. 56] The Court: Objection denied.

Mr. Rembar: Exception.

A. My guess would be less than half.

The Court: Less than half?

The Witness: Yes.

Q. Does the depicting of these sexual relations, be they intercourse, homosexuality, Lesbianism, or depravity, in this fashion, in your opinion, arouse prurient interest in the reader?

Mr. Rembar: Objection, your Honor, on the same ground to which I objected to these questions in the plaintiff's case **in chief.**

The Court: You object, that the witness has to have in mind what the legal definition is of prurient interest. Prurient is a word of many years' usage.

This witness can answer the question.

Mr. Rembar: Your Honor, it was a word of many years' usage prior to 1957. In that year, the Supreme Court made it part of a rule of law.

The Court: Just a moment. If you want to take an exception, you may have an exception.

Mr. Rembar: I would like to state a further ground of objection, if your Honor will allow me.

The Court: All right. State it.

Mr. Rembar: This cross-examination goes far beyond the direct examination which was confined to the issue of literary merit.

[fol. 57] The Court: That doesn't go in Massachusetts. He can examine on any issue that may arise in the case.

Objection denied.

Mr. Rembar: Exception.

The Court: Exception noted.

A. Your question was, "Do these episodes presented in this way arouse prurient interest?" By "in this way" you mean in the prose style in which they are presented?

Q. No, just as presented in the book, Doctor.
A. As presented in the book?
Q. The form as presented in the book.
A. As presented in the book. The answer is No. That is not the chief—

Mr. Sullivan: May I ask that be stricken?
The Witness: I will ask for a clarification.
The Court: Whatever it is, it is out.

Q. The depicting of the sexual episodes in this book as presented in the form as set forth in this book, do they arouse a prurient interest in the reader?

Mr. Rembar: Objection, your Honor, on grounds previously stated.
The Court: Objection denied.
Mr. Rembar: Exception.
The Court: Exception noted.

[fol. 58] Q. A Yes or No, Doctor.

The Witness: Judge, I cannot give a Yes or No because it arouses many interests, of which a prurient is—

Q. Would you kindly state that you cannot give a Yes or No answer?
A. I cannot give a Yes or No answer.

The Court: All right. We will take the morning recess.

(Short recess.)

Mr. Sullivan: I have no further questions of this witness, your Honor.

Redirect examination.

By Mr. Rembar:

Q. You were asked on cross-examination about the passage in the book in which Fanny Hill observes a homosexual encounter. What is her attitude toward this? What is her reaction to having seen what she says she saw?

Mr. Sullivan: Objection, your Honor.

The Court: Of course, I have read the whole book, but I will allow the question.

A. Anger and disgust.

Q. There were questions directed to you about certain parts and certain passages of this book, and your opinion of them was asked. What is your impression of the book as a whole?

A. My impression of the book as a whole is that it is essentially trying to be, and is successful in being, a literary work, that is to say, a piece of writing that intends to and succeeds in evoking a literary response.

Mr. Rembar: That's all.

[fol. 59] JOHN M. BULLITT, Sworn.

Direct examination.

By Mr. Rembar:

Q. Would you state your name, please?

A. John M. Bullitt.

Q. What is your position, Mr. Bullitt?

A. I am Professor of English at Harvard and Master of Quincy House.

Q. Do you have any particular specialty within the field of English?

A. Yes, the 18th century is my special field.

Q. Have you read the book in issue?

A. I have.

Q. Do you have an opinion as to its literary merit or other value?

A. Yes.

Q. Would you state it for the Court, please?

A. As clearly as I can, I should say that the book has detectable literary merit and considerable historical value.

Mr. Sullivan: May the last portion be stricken, your Honor? I object to that last.

The Court: It wasn't responsive to the question. It may go out, but you may ask the witness the same question.

Mr. Rembar: I asked whether or not it had literary merit or other value, your Honor. The witness is saying it has historical value as well as literary merit.

Mr. Sullivan: I don't believe he has been qualified as an historian, your Honor.

The Court: Read the last question. I only understood it inquired about literary value.

(Question read by the stenographer.)

[fol. 60] The Court: I will allow the answer to stand.

Q. Will you go on, please?

Mr. Sullivan: Would your Honor note my exception?

The Court: Exception noted. You are excepting to the portion where he says it has historical value?

Mr. Sullivan: Historical value.

A. I don't quite know how far you want me to go. It seems to me that much has already been said with which I would whole-heartedly agree, namely that we have here a book which is—

The Court: Just a moment. We can't take that as evidence.

Mr. Sullivan: May the witness be asked on how far he is to go, your Honor?

The Court: No. By saying he agreed with others cannot be accepted as evidence. That part may go out.

Q. That part is stricken out, but you may state what that opinion is.

A. Yes, all right. This, it seems to me, is a novel which is a deliberate work of art, not, I must say, in my judgment, a great work of art by any means, but recognizable as an effort to interpret a rather complex character living in a world peopled by highly diversified characters, going through a number of very different adventures.

There is evidence, it seems to me, here of a rather skillful, not greatly skillful, but rather skillful effort to construct a recognizable plot with a purpose behind it.

There is, in my view, clear evidence that this book has a good deal of interest as it relates to a number of other books in the 18th century which are concerned with some of the same themes, some of the same points of view.

[fol. 61] As I understand Cleland, he is presenting here a moral situation in which he is affirming certain moral values, certain attitudes. The structure of this affirmation is to set somewhat in opposition the idea of sensual delight on the one hand in opposition to, what shall we call it, prudence, or rationality, on the other.

This is a theme which was common in the 18th century. It underlies "Joseph Andrews" of Henry Fielding; it is a theme which is part of the moral structure of Richardson's "Clarissa" and "Pamela", and so on, very commonly. Cleland resolves it in a way which is customary among his contemporaries in the 1740's, namely, although she asserts very strongly throughout the novel the value, the importance, of sensual pleasure, she at the same time learns, and the sense of the novel can be construed as the education of a young woman in a moral life, the value of love.

Actually, this learning process begins at the very beginning of the novel until at the end she concludes, first of all, the education with the last of her lovers, the old man who dies, who educates her in a kind of intellectual responsibility, and, finally, she finds her true love in the figure of Charles. Here she asserts during those last pages at some length the whole idea that a sensual passion is only truly experienced when it is associated with the emotion of love.

There is an element of the novel that has not been touched on frequently, which I would like just briefly to mention. In fact, there are two elements. We have not discussed the novel in terms of its comic possibilities.

There is a good deal of comedy in this novel, deliberate, calculated comedy. For example, the metaphoric structure which Fanny uses when she describes her seduction, if I may use that word, by the sailor, is nautical. She falls into purely nautical phraseology. I have forgotten the terms—I have at my desk a list of them, at my seat over there, but if there is any question about it, I can find the passage.

Q. You are referring to the—

A. To the sailor who picks her up.

[fol. 62] Q. —encounter with the sailor?

A. Right. At one point in the novel, she has an affair with a businessman. The metaphor in that case is filled with references to business terms, and so on. This is deliberate, calculated, and is amusing.

The second aspect of the book, it seems to me, that might bear emphasis is the way in which Cleland follows a tradition of descriptive characterization. It may not be an accident that she takes the name "Fanny". It may be that Cleland clearly had the adventures of Joseph Andrews, by Henry Fielding, in mind.

In "Fanny Hill," Fanny is described in great and really quite delightful physical detail. If anyone wishes me to read the passages, I can do so, but the detail of this description very closely parallels the description of Fanny in "Joseph Andrews". So, it is perfectly evident that he is here bringing to his piece of fiction an experience, a literary artistry, which he has learned from one of the great and acknowledged masterpieces in the 18th century.

Another element that I might mention as perhaps an interesting insight into the significance of this book for the period is that the famous French poet, Guillaume Apollinaire, brought out an edition of "Fanny Hill" in the 19th century, a translation of it into French, to which he added a very long introduction, most of which, not in his words, most of which consisting of a transcript of parts of the memoirs of Casanova, and a transcript of a book written in the 18th century which gave an historical account of the seraglios, the bagnios, the brothels, and the famous women who ran them in the 18th century.

This clearly is a piece of rather remarkable social history of interest to anyone who is interested in fiction as a way of understanding society in the past. It is interesting that one of the ladies who is mentioned in this historical account is named Mrs. Cole, who is one of the two rather sharply distinguished madams in the story, and this sharp distinction is a further instance that he is not simply mechanically

grinding out characters, and this Mrs. Cole, of the two, is [fol. 63] the more sympathetic, and she is presented rather sympathetically here in Apollinaire.

Q. You just mentioned, Mr. Bullitt, two characters who are quite distinct in the book. Is there in general the treatment of character and the development of character in this book that is typical of the novel as a literary form?

A. Very much so. Perhaps the proper way to start answering your question is to refer to a critical remark made by Henry Fielding in "Tom Jones."

The Court: No, You can't bring hearsay in there.
The Witness: Sorry.

A. In answer to your question, yes, there are a number of characters. There is Esther Davis, the woman who brings her to London. There are very careful, exuberantly done characterizations. I am trying to find the one of Mrs. Jones, for example, who is described as being about 46 years old, tall, meager, red-haired, with one of those trivial, ordinary faces you meet with everywhere and go about unheeded, unmentioned.

The Court: What page is that?
The Witness: Page 61.

A. There is a rather careful effort here to delineate this person. The early Phoebe, who is "red-faced, fat and in her early 50's, who waddles into a room." She doesn't walk in, she waddles in.

This kind of writing is very skillfully done. It is a mark of an artist.

Mr. Rembar: Thank you; that's all.

[fol. 64] Cross examination.

By Mr. Sullivan:

Q. Earlier, Professor, you used the word "seduction" and then said, "Pardon me for using that term." Why did you say, "Pardon me"?

A. I was trying to recall vividly exactly what went on between Fanny and the sailor.

Q. You didn't know if it was an accurate word to apply to—

A. To apply to that particular scene. I wasn't quite certain. I would have to look again at the opening passage to be sure.

Q. You say there is considerable sensual delight in the book?

A. Yes.

Q. Would you say that those passages that relate to sensual depravity are delightful as well?

A. I don't understand, sir, your question.

Q. First of all, are there depictions of depraved sexual relations in "Fanny Hill"?

A. Depictions?

Q. Depicted.

A. A homosexual scene is depicted.

Q. Would you answer my question Yes or No, are there phrases—

A. Yes.

Q. There are?

A. Yes.

Q. Would you also say they are sensual delight?

A. No. To whom, the reader or to Fanny?

Q. To the reader.

A. To the reader, no.

Q. You also say that Fanny operated in a world of diversified characters?

A. Yes.

Q. Of the characters in the book, how many of the characters are depicted in relation to non-sexual happenings? A rough estimate.

A. May I ask a question?

[fol. 65] Q. Certainly.

A. To clarify your question, do you mean in their total life span given to us, because some of the characters who are involved in sexual exploits have a good deal of other things—

Q. Any time they appear in the book.
A. Any time. Very few, if any.
Q. Very few, if any.

Mr. Rembar: I'm sorry—would you repeat the question, please?

The Court: How many characters in the book were concerned with non-sexual activities.

Mr. Rembar: At any time, was that it, or wholly?

The Witness: At some time.

Q. At some time in the book concerned with non-sexual activities. What was your answer?
A. My answer to that would be No.

Mr. Rembar: I thought he misunderstood.

A. (Continuing) I thought your question—let me give a straight-forward answer. So far as I can recall, every character in the book has, at some time or other, some relation to sexual activity.
Q. That's what I understand you to say. Then you say this book has a plot and a purpose, do you not?
A. A plot, certainly. A purpose, I am not sure I understand you, sir.
Q. I believe you said in direct examination that there is a definite purpose set forth in the book as the author—
A. If I said that, I would revise what I mean. I think that, yes, one purpose here is to write a novel that is going to be of interest to his readers. That is perfectly clear. Beyond that, he does have an idea to present—a purpose in that sense. He is communicating.
[fol. 66] Q. He shows this through characters, does he not?
A. Yes, indeed, through what the characters say.
Q. You have said all these characters at some time or another in the book have some relationship to a depicting of sexual relationships?
A. Yes.
Q. You also said that Fanny was an intellectual person?

A. That, I believe, was not my phrase. It was used by, I believe, a previous witness, but I think that a very good case could be made for that. I wouldn't put her I.Q. at any great height, but intellectual in the sense that this book is written, as it were, at the moment, reflecting back upon a life span of action, and she reflects upon incidents that took place.

Q. It is really only part of a life span, isn't it?

A. Well, it depends—I am not quite sure how old she is right now as she writes it. The book takes her, as I recall, from 15 to 19.

Q. That's right; then she marries Charles?

A. Then she marries, that's right. She has children by him, so she must be an older woman now.

Q. You gather at least some, well, ten or more years after she married Charles?

A. Yes.

Q. I gathered the same.

A. The story then goes up to the conventional termination of most novels, at least in the 18th century, namely, action before marriage, matrimony, and that is the conclusion.

Q. This is only a four-year span of her life?

A. As I recall, yes.

Q. And you testified this was how she depicted her education?

A. Yes. Now, as I recall, she came to London with very little education, her parents having died when she was young.

Q. Smallpox?

A. Smallpox, exactly, and she was innocent, and she attributes falling into vice to ignorance and innocence. This, [fol. 67] again, is a very familiar theme in the 18th century. Hogarth has a whole series of prints on the subject.

Q. I wish you would answer my question.

A. Yes, sorry.

Q. We don't have to get into other books. Incidentally, Doctor, are you here under summons?

A. Under summons?

Q. Yes, were you summoned or asked to be here?
A. I was asked, yes.
Q. And you voluntarily came in?
A. Voluntarily, yes.
Q. Do you believe that the reader of this book would have aroused in him or her prurient interest?
A. What reader?
Q. The average reader in the community to whom this book becomes available.

Mr. Rembar: Your Honor,—

A. Do I have to answer this Yes or No?

Mr. Rembar: —I know your Honor has ruled on this, but I make the same objection.
The Court: Objection denied.
Mr. Rembar: Exception.
The Court: Exception saved.
The Witness: Your Honor, do I have to answer that Yes or No when I find it very difficult? I am no sociologist, your Honor; I am a professor of English.

Q. Let me rephrase it.
A. I am not a sexologist; I am not a professional in this matter.
[fol. 68] Q. Are you familiar with the dictionary term of prurient interest?
A. Based on the Latin term meaning itch.
Q. Would you, upon reading this book, and being a literary expert, which I am sure you are, I am quite impressed with your credentials, feel that the average reader in this community would have aroused in he or she a prurient exercise or interest?

Mr. Rembar: I am sorry—prurient what?
Mr. Sullivan: Well, prurient interest.

A. An interest in prurience, did you mean by that phrase?
Q. Yes.

The Court: I will save your objection and exception. Again, it is the same question.

A. I think it is possible, but I find it incapable, honestly, to be certain.

Q. Well, there is homosexuality in this book, isn't there? A. Oh, yes. Surely no homosexual would be aroused by this.

Q. There is Lesbianism in this book?

A. Yes, and I can't imagine a girl being stimulated to Lesbianism.

Q. And there are depictions of depravity in this book?

A. These are two depictions of two kinds of depravity, yes.

Q. And a good deal of sexual intercourse?

A. Yes.

Q. Is the book obscene in your opinion?

A. I have no opinion on obscenity.

Q. You have no opinion on obscenity. Do you have an opinion on offensiveness?

A. Yes.

Q. Do you feel it is offensive?

A. No.

Mr. Sullivan: I have no further questions.

[fol. 69] Redirect examination.

By Mr. Rembar:

Q. Mr. Bullitt, you were asked whether in this book there is delight in the two scenes of depravity to which reference was made, and you asked whether my brother meant delight on Fanny's part or on the reader's part. What is your answer to each, that is, considering the reader and Fanny?

A. I think in this case we are somewhat influenced by Fanny's own response. Fanny's response is disgust, horror, indignation. She explains very carefully that the only reason she sees the scene to its conclusion is not for any pleasure that she receives in voyeurism, but rather so that she can document the facts so that she can go and get help and to have the people arrested. This is the reason why

she hurries so rapidly, catches her foot on a nail, falls, is knocked unconscious; they hear her and they escape.

Mr. Rembar: No further questions.

Recross examination.

By Mr. Sullivan:

Q. I would like to ask one question. Are you married?
A. I am indeed.
Q. The language used in this book—is this the type of language you would use over the breakfast table with your wife?
A. There isn't a single dirty word in this book.
Q. Would you answe ay question?
A. Yes, indeed; indeed.

Mr. Sullivan: No further questions.

Robert H. Sproat, Sworn.

Direct examination.

By Mr. Rembar:

Q. Would you state your name, please?
A. Robert H. Sproat.
Q. What is your position, Mr. Sproat?
A. I am Associate Professor of English Literature, Boston University.
[fol. 70] Q. How long have you been on the faculty at Boston University?
A. Approximately 17 years.
Q. Have you read the book before the Court?
A. Yes, I have.
Q. Do you have an opinion as to whether it has literary merit or other value?
A. Yes, I do.
Q. Would you please state that opinion for the Court?

A. I think "Fanny Hill" has very definitely literary merit and, as such, I believe it has social value. Having literary merit, I believe it belongs to the history of English literature rather than the history of smut.

It is a novel that, esthetically or artistically, is a unified work of art, having a very interesting structure, even though the division of that structure seems to be in two parts—it is fundamentally in three parts. It bears upon the development of the character of the heroine.

Q. What are those three parts?

A. The first part, up to her meeting with Charles; the second with her experience with, I think it is, Mr. H.; and then, finally, her salvation in love with Charles.

I think each of these sections is intricately or organically related to the character of Fanny, to help develop the heroine's final moral and philosophical values. Now, they aren't very great, I will admit that—they are not profound, but they are legitimate values, and they are positive values.

Q. What are those values?

A. I think that, at the risk of oversimplification, she finds that love, that sex without love, with love, is a good thing.

Q. Would you repeat that sentence?

A. That sex with love is a good thing, that is, a morally good thing, that she is dealing with the opposition, or that Cleland is dealing with the opposition in the novel between sex without love and sex with love.

Now, he agrees, Cleland's point is clear, it seems to me, that sexual, natural sexual expressions or joys, are funda- [fol. 71] mentally good. Unlike Kinsey, I would say that Cleland's attitude is that sex is good qualitatively rather than quantitatively.

Fanny realizes this. I think that the character herself—though Cleland doesn't have the skill that a Fielding has —yet she is a minor, she belongs, it seems to me, to the minor classic heroines, falling someplace, I would say, perhaps between James Joyce's Molly and Moll Flanders.

Q. She forms the link between Moll and Molly?

A. Possibly. I am trying not to repeat what has been said before, but the one aspect, I think, I found interesting

about the work, is the way the language functions in his novel to create a distance, even when the sexual experiences are portrayed, and, I will admit, they are portrayed in detail. That one's response to those scenes is a literary response has been brought out by a previous witness.

One is not unaware of the formal values of the work. I think that one's response is, in part, or, as it is in any work of art, both to what is being said and how it is said at the same time. Very often, I think that this is a saving grace, for many of the scenes, translated into language of the present, realistic, naturalistic, in the language of the realistic, naturalistic novel, could be quite offensive. But I find it not offensive.

Q. So far as these realistic, naturalistic novels of the present are concerned, do you find that they treat sex in as explicit detail as this book does?

Mr. Sullivan: Objection, your Honor.

The Court: I will allow it.

A. I think that in many novels, and John Updike's "Rabbit Run" come to mind, in one particular passage, it is just as explicit, if not even more explicit, a treatment of sex—passages in James Baldwin. Now, I am not saying that they are particularly offensive. Mary McCarthy approaches [fol. 72] it in a more clinical way—I find it more enjoyable, myself, to read John Cleland, though I hate to say this about Mary McCarthy.

The Court: Have you found books with as many repetitive sexual experiences as this book?

The Witness: Well, the episodic nature of this 18th century novel, which often belongs to the genre, makes it almost inevitable that one will have a repetition of the same sort of thing over again. On the other hand, I think that in the case of Baldwin, that the total import of the book rests, at least as I see it, upon all values, all themselves resolved in terms of fundamental sexual relations. In that sense, I would say it has more sex in it, but to answer your question, in a quantitative count, I would say no, probably.

Q. I want to make sure I understand you on what you said about the style as it affects the response of the reader. Would you mind going into that a little bit more?

A. I think one can say that, in the response to a work of art, as perhaps you all know, one cannot separate the form from the content, but, very often, there is a slight emphasis on one over the other. Teachers often teach from the standpoint of content—I find people in comparative literature tend to do this—rather than paying attention to the total work of art, the formal value.

What I found amazing in this book is the style itself, the words, the language, the metaphor—and we do have evidence that Cleland himself was aware of this—and we have a rather eccentric theory of language—I believe Mr. Quennell points this out in the introduction—concerned with language, with metaphorical expression, and one responds to that when one is reading about the sexual, when one is reading the novel, and particularly the sexual episodes. It rescues—put it this way, the language transmutes what might have been, what could be a brutal or raw and directly expressed vulgar situation into something literary.

I don't know if that answers it.

Q. It does.

Mr. Rembar: I have no further questions.

[fol. 73] Cross examination.

By Mr. Sullivan:

Q. A vulgar situation; do you find "Fanny Hill" vulgar at points?

A. I do not find it vulgar, if I know what you mean by vulgar.

Q. Offensive?

A. Offensive, no. I do not find it at all offensive.

Q. You say that this book has some literary merit. I believe you used the phrase "not great" and "not profound."

A. Right.

Q. But some value?

A. Some value.

Q. That value is that sex with love is a good thing.

A. Well, put that way, that is a rather amateur, crude way of putting it, but fundamentally—

Q. I think I wrote down your words.

A. Yes, I know. I am criticizing myself, sir, not you.

Q. Does Fanny love all the characters she has—

A. She doesn't love, but you will notice, I think, if you read it carefully, that she, in every instance except the flagellation episode, has to feel, or wants to feel, some kind of tender feeling, if you will, or have some tender feeling. You will notice that throughout there is much concern with manners; she may find that the man was very mannerly and she admires his manners.

Q. She had no tender feeling when she was trapped, as we are wont to have said earlier, into observing the homosexuality scene.

A. She was outraged by that.

Q. She was angered and disgusted?

A. She was angered. I am trying to say that even in her profession she is constantly reflecting, and this has been brought out before, she is constantly reflecting, she is reflecting upon the manners of people.

Q. If the literary merit that grows out of this novel is that sex with love is a good thing, what purpose can be [fol. 74] served by depicting the homosexual scene? If that is a literary merit that comes out of this book, could not that purpose have been served otherwise?

A. I suppose it could, except that that scene does help to define the character of Fanny. She is a—if I may quote a phrase used with admiration about Mr. H., "He is a rational pleasurist," and she same something of this herself. In other words, I think perhaps one can justify that scene on the grounds that it further develops the character of Fanny.

Q. But it has no particular relationship to the literary merit you draw out of the book, the literary merit that you suggest would be there without the homosexual scene?

A. No. I see what you mean, but I feel a work of art is an organic whole, and if you lop off any part, you destroy the whole.

Q. You feel this is a work of art?
A. Yes, a minor work of art.
Q. Do you also think it is obscene?

Mr. Rembar: Same objection, your Honor.
The Court: Objection denied.
Mr. Rembar: Exception.
The Court: Exception noted.

A. If I should answer that—may I ask a question? If I say No, I don't want to be forced to define "obscene" because I am not sure what you are getting at, but I do not think that—
Q. Supposing—
A. I do not find the book offensive. I do not find the book offensive. I find it erotic.
Q. Would you accept the definition of "obscene" as disgusting to the senses?
A. As disgusting to whom, sir?
[fol. 75] Q. The sense, senses, our senses?
A. Our senses—if that is the definition, I would say it is not obscene.
Q. Do you feel that the book arouses prurient interest in the reader?
A. Well, once again, I do feel that I cannot judge. I am not qualified to judge this matter. This is a matter for a sociologist.
Q. I think that's a very accurate answer. Do you also feel, with regard to the characters in this book, at any given time during the book, that they all have some relationship to the depicting of a sexual relationship of some sort?
A. As I recall, I think yes; yes.
Q. And if we were to remove all the sexual relations out of this book, how much of the book will we have left, proportionately?

Mr. Rembar: Same objection, your Honor. It is the same question.
The Court: Same ruling.
Mr. Rembar: Exception.
The Court: Exception noted.

A. Well, once again, you see, we are involved in this question of the relationship between form and content. The work of art is achieved content. By just taking and extracting something and saying what is left, you have an entirely different work of art.

Q. I know it is difficult, perhaps, because I am sure you are an accomplished literary person, and I respect you for that, but let's try to look at this coldly and factually. On the great number of sexual relationships that are recited in this book—and they are recited quite explicitly, are they not?

A. Are you talking about just the acts that are described or the reflections about the acts, the thoughts?

[fol. 76] Q. Both.

A. Both. If you went through and took all these out—that is what you are saying—presuming we could all agree on what was sexual, whether it was offensively sexual or not—

Q. Just your opinion, not what I would agree on; just what you feel.

A. May I answer that this way, by saying that I would disagree with the former witness who said it was less than fifty percent of the book that deals with sexual matters.

Q. Do you feel it would go as high as seventy-five percent?

A. Well, I am not—

Q. You don't want to beggar the issue?

Mr. Rembar: I repeat the objection.

The Court: He didn't make any answer.

Mr. Sullivan: Thank you very much, Mr. Sproat.

Redirect examination.

By Mr. Rembar:

Q. When you said that the principal value dealt with in the book is sex with love is a good thing, you were speaking in terms of a moral value, were you not, sir?

A. Yes.

Q. There is another sense in which the word value has been used here, and that is literary value, which, I assume,

can consist of many things. So far as literary values go, did you mean to say that that particular moral concept was the only value in the book?

A. Oh, no. I meant that this was value in the sense of a theme in the book—one of the themes, the development of the character, the structure of the plot, the setting, the style, and so forth and so on. There are other themes, in other words, in the novel. This is one of them.

Mr. Rembar: That's all; thank you.

[fol. 77] Norman N. Holland, Sworn.

Direct examination.

By Mr. Rembar:

Q. Would you please state your name and residence address?

A. Norman N. Holland, 196 Appleton Street, Cambridge 38.

Q. What is your position, Mr. Holland?

A. My position?

Q. Yes, your occupation?

A. I am an Associate Professor of English at M.I.T.

Q. Have you read the book in issue?

A. Yes, I have.

Q. Do you have an opinion as to its literary merit or other values?

A. Yes, I do.

Mr. Sullivan: I would like to know more about his qualifications, your Honor.

Mr. Rembar: Certainly.

Q. How long have you been teaching, Mr. Holland?

A. I have been teaching eleven years.

Q. Have you taught English literature during that time?

A. Yes, all that time.

Q. During all of it, and you are now an assistant professor?

A. Associate professor.

Q. Pardon me, associate professor, at the Massachusetts Institute of Technology?

A. Yes.

Mr. Rembar: Is there an objection to the qualifications of the witness?

[fol. 78] Mr. Sullivan: No. He doesn't look like he has been teaching eleven years.

The Witness: I better make this clear—I have been counting two years as a teaching fellow. You asked when did I begin teaching; I have been full-time teaching nine years.

Q. I asked you whether you had an opinion. Now I ask you to state that opinion.

A. It seems to me that the book has literary merit and it has other values. Let me start with other values. I find it extremely interesting from the point of view of a literary historian, essentially as a record of the historical, psychological, social events of the period.

This is a novel of 1748, which was the great decade of the growth of the English novel, and it seems to me that Cleland occupies an interesting place in it, in the transition from what we could call the epistolary form, that's the use of letters to tell a story, toward a more straightforward narrative technique.

I find a lot of descriptions of clothes and prices and customs which are of great interest to me, perhaps because I am a collector of minutiae, I don't know. I note, for example, that the servant is given a silver watch, and this strikes me as an odd and interesting custom that I would like to know more about.

I notice also another 18th century theme, this sense of inherited as against earned wealth, which is an important distinction they made.

Also there is the sense of a ruling passion which I think is a very important part of the theme of the book as a whole. This is the 18th century's version of what we would think of, I suppose, as modern psychology. I think there

is a great deal of insight into the awakening of a woman, into the sexual act, both its normal and its perverted forms.

It seems to me, too, that we learn something quite important here about the sexual tastes of the 18th century. These things, needless to say, are hard to come by, this kind of information. Here I notice in this book a tendency [fol. 79] away from nakedness during the sexual act which I find an interesting sort of sociological observation.

Let me talk for a moment about it simply as a novel. It seems to me, if I were asked to rank it in terms of its literary merit, I would put it some place below the works of Fielding, "Joseph Andrews," "Tom Jones," and some place above Defoe's "Moll Flanders" which makes it, I would say, not a great novel but certainly a rather good one.

In terms of the values of a novel, I think we ask that it come together in a meaningful artistic whole, and it seems to me that this novel does. We would ask that the style and the content work together to create a meaningful experience, and we would ask that the form of the novel and its theme come together to create, again, a meaningful experience.

A number of the other witnesses have commented on the style of the novel which seems to me to be very important. The technical term that an English teacher uses is periphrasis, which is the Greek form of the Latin circumlocution, and I suppose English teachers use it because it makes us sound more learned. But, essentially, all we mean is it is not calling a spade a spade. It is masking over the events described by different kinds of metaphors and figures of speech, as, for example, when she is in her encounter with the sailor, she slips into nautical figures of speech. She refers constantly to the male sexual organ as an engine, this kind of thing, which is pulling you away from the way these events would be described in the 19th or 20th century.

It seems to me that this style of the whole pervades and affects our response and makes an important contribution

to it, specifically, a sense of masking over the events described, and this is why I think the tendency to play down nakedness in the actual events of the novel is quite interesting because the style itself is trying to cover over.

Curiously, Fanny says she is going to give us a naked truth; on the other points, she says she will draw the curtains, and so on. There is a great deal of interest here in what is going to be revealed, made plain, and what is going to be held back.

[fol. 80] Another way in which the form or structure of the novel works together with the theme, it seems to me, is in the sexual acts themselves, that Cleland is using the various sexual acts in the novel to trace the moral progress of his heroine. That is, she starts out with sexual episodes which are not the sexual relations between an adult man and an adult woman, and it is only with her encounter with Charles that she achieves sex with a man, and also with love, as it turns out.

Then she goes farther and farther away from this ideal through the next third, roughly, of the novel. The various episodes that have been mentioned here, the watching of the homosexuals, the masochists, the encounter with the sailor and so on, all of these fall farther and farther away from her ideal relationship with Charles. Then, at the end of the novel, she encounters the rational pleasurist and becomes his heiress, both in money and in wisdom, and shifts over to Charles, discovers Charles again, and comes back to sex with love.

It seems to me that the sexual content of the novel is part and parcel of the theme of the novel. I would agree with the statement that the theme of the novel, in a simpliefid form, is that sex with love is a good thing, morally, psychologically.

This, it seems to me, is all tied up with the style, with the sense of covering things over; that, simply, the raw passion, the ruling passion as Fanny calls it, is not enough, that it has to be with love, with marriage, with, if you like, 18th century poetic diction.

In short, it seems to me this is a novel that comes together beautifully and, well, I was quite pleased to discover it when the publisher brought it out.

Q. Mr. Holland, do you find any observations about people, human behavior, in this book that you deem to be of interest?

A. Yes. I find that there are two that interest me. The first was the awakening of Fanny as a woman to a woman's mature sexuality. It seems to me that Cleland has considerable insight into this process, and that he makes—[fol. 81] well, one is always grateful when a poet or a novelist can bring his insights out in the open in a way that they can contribute to the learning of the rest of us.

And this is true, I think, of his treatment of the masochist. That is, he makes it quite clear in the discussion of the masochist that the pleasure is not in the pain that the man receives, but rather that the pain serves as a prepayment, as it were, of his own guilt, that he can then have the pleasure of the sexual relationship. This, it seems to me, is a very striking insight. It has only been within the last twenty years, I think, that modern psychologists have come around to this view of masochism. It is extraordinary to find it in Cleland in 1748.

Mr. Rembar: That's all.

Cross examination.

By Mr. Sullivan:

Q. Fanny used the words "ruling passion", did she?
A. Yes, she did.
Q. What is that ruling passion?
A. Sexuality, the sexual drive.
Q. Find much of it in this book?
A. Yes, a good deal.
Q. How much of the book is devoted to sexual relations?
A. Mr. Sullivan, are you speaking of numbers of pages or of the book as an artistic whole?

Mr. Rembar: Your Honor, may I repeat the objection and save the exception?

The Court: All right.

Q. Percentific wise.

A. Mr. Sullivan, I don't understand how you can talk about a book in percentages.

Q. Would you answer my question?

A. A book is an artistic whole. You can't divide it into percentiles.

[fol. 82] Mr. Sullivan: May the Court instruct the witness to answer the question?

The Court: How much of the book was devoted to sexual episodes? Is that your question?

Mr. Sullivan: Yes.

Mr. Rembar: I think the answer was that he can't answer it.

Mr. Sullivan: Why doesn't he say he can't answer it?

Mr. Rembar: He said so and explained.

The Court: He didn't say that. He said you had to consider it as a whole.

The question is permissible.

A. May I expand on this?

Q. No. You said that oftentimes Cleland refers to the male sex organ as an engine.

A. I said, I think, Fanny refers to it as an engine.

Q. Fanny does; Cleland through Fanny?

A. Well, there is a difference. I like to keep the difference.

Q. Well, the term "engine" is used for the male sex organ?

A. Yes.

Q. Often in the book?

A. Yes.

Q. And the term "machine"?

A. Yes.

Q. You also say that a theme of the book is to play down nakedness?

A. No, not a theme. Just as these various sexual acts happen, you notice that nakedness does not occur as often as I suspect it would among modern Americans in similar situations.

[fol. 83] Q. Well, in these references to the engine and the machine, is the machine naked at this point?

A. Well, it could hardly not be.

Q. Would you say this was a vivid description?

A. No, it is not vivid at all. It is just the opposite.

Q. Played down?

A. No, it is distance. You are given this peculiar comic perspective. My goodness, the word engine or machine conjures up to me notions of watchworks and the like. This is an odd, an interesting kind of description.

Q. Maybe a paper mill?

A. Well, not—

The Court: In the foreword, Mr. Quennell calls it "bodily equipment".

Q. Isn't the machine and/or engine quite minutely described on a number of occasions in the book?

A. Yes, provided that you recognize it; it is a peculiar kind of 18th century language.

Q. Will you answer Yes or No, Doctor?

A. Mr. Sullivan, all I am trying to say—

Q. Can you give me a Yes or No answer?

A. Not exactly.

Q. I don't care what you are trying to say. I want you to answer my question.

A. It is not described the way a 20th century writer would describe it if you were minutely describing something.

The Court: The question was, in the book, was not this machine or engine quite specifically described?

The Witness: Well, all right, although I still insist that it is in this funny 18th century language, special 18th century language.

Q. The answer is Yes?

A. The answer is Yes, but—

[fol. 84] The Court: You don't need to ask that question again. I read the book. There is a lot of description in the book about these various episodes. I think I understand a description whether given in the 18th century or not.

Q. Are you married, Dr. Holland?

A. Yes, I am, Mr. Sullivan.

Q. Would you use the type of language that is used in this book over the breakfast table with your wife?

A. I would, were I so skilled to speak it.

Q. Would you use this language with a group of eight or ten couples that might come into your home for tea?

A. Yes.

Q. You would?

A. As I say, if I could.

Mr. Sullivan: That's all.

Redirect examination.

By Mr. Rembar:

Q. Mr. Holland, are you familiar with the Horatio Hornblower novels of Mr. Forester?

A. Dimly. I used to read them when I was a kid.

The Court: You say dimly?

The Witness: Dimly.

The Court: It reminds me of the use of the words "dim beacon" in the "Tropic of Cancer" case.

Mr. Rembar: In the minority opinion, your Honor.

Q. Would you say that those novels dealt in large part with the activity of sailing?

A. Yes.

[fol. 85] Q. Would you also say that there is almost no character in that book who is not involved in some way or another in sailing ships?

A. Right; I think that's correct.

Q. As a student of the novel, can you tell me whether it has ever been thought to be a literary requirement that a novel deal with all aspects of life?

A. No, not particularly. A novel necessarily has to limit itself to the scene somewhat and that sort of thing.

Q. Does it deprive a novel of its quality of a work of art if it deals with one aspect of life as, for example, sailing ships?

A. No, not at all.

Mr. Rembar: That's all; thank you.

The Court: Two o'clock.

(Noon recess.)

Afternoon Session

at 2:00 o'clock P.M.

Colloquy Between Court and Counsel re Exhibits

Mr. Rembar: If the Court please, before proceeding with my next witness, I would like to offer in evidence copies of certain newspapers, photocopies, and an original copy of LIFE Magazine.

The Attorney General does not question their authenticity, but takes the position that they are not relevant.

They have to do with the treatment of Profumo-Ward scandals last summer in newspapers and magazines of general circulation. I submit that under the cases cited in my brief, these materials are admissible and relevant.

[fol. 86] The Court: To what cases are you referring?

Mr. Rembar: I am referring to the case of United States vs. Roth; the case of Smith vs. California, and the case in this state of Attorney General vs. Tropic of Cancer. These bear on the issue, I say, of contemporary community standards.

The Court: The ones we had this morning are concerning the opinions of certain persons holding themselves out as critics. Each one of those concerned was some opinion testimony of a witness who is not here, and purely trying to get in opinion evidence in violation of the hearsay rules.

Mr. Rembar: In that connection, I know your Honor has ruled, but I should like to offer those book reviews which came up this morning in evidence, and your Honor has ruled, I think, that they will not be accepted, but I wish to make the formal offer.

The Court: I have acted on those this morning and I have protected your rights. I don't see any need to go over it again.

Mr. Rembar: Yes, sir. Well, now, on this material, however, it goes to a different issue. Those were offered on the matter of literary merit. What I have here is offered for quite a different purpose and it has to do with a different test of obscenity. It has to do with the criterion of whether a particular work transgresses contemporary community standards and what the Court has called customary limits of candor.

I wish to show through this evidence that the public was quite inured to the very type of happening that is portrayed in the novel, was inured to it through seeing it in newspapers and in magazines.

The Court: I will hear you.

Mr. Sullivan: I wish to object, your Honor.

Again, we agreed with my brother that the authenticity of these articles is not contested. However, we are dealing [fol. 87] here with what the public thinks, and I do not feel that that is a proper method of approaching what the contemporary mores or the candor of a given member of the public is.

As your Honor has most correctly pointed out, my objection also relates to the inadmissibility on hearsay grounds. But specifically on the ground of what the public mores may have been while this book is published, I do not believe that these publications are relevant or material to that question.

Mr. Rembar: I wish to point out only one further thing, that, so far as the hearsay rule is concerned, these are not being offered in order to establish the truth of their contents. They are being offered only to show what the

general public was reading at about the time this book was published.

The Court: When was it published?

Mr. Rembar: June, 1963.

The Court: Is that agreed to? You mean this paperback edition?

Mr. Sullivan: I have November of 1963.

Mr. Rembar: It was in the fall, September, October.

The Court: Can you agree that it was either imported, sold, loaned, or distributed in the Commonwealth?

Mr. Rembar: We agree.

Mr. Sullivan: That's an admission in the answer, your Honor.

The Court: Of course, one issue in a case like this is what are the community standards in relation to decency. Let me see the papers.

This particular book was banned in this Commonwealth as early as—

[fol. 88] Mr. Sullivan: 1821, your Honor.

Mr. Rembar: It was an illustration, your Honor, that caused the trouble. I think the report of the case so indicates.

The Court: I think in one of the forewords I read it said that this was the first case in America that a book was suppressed for obscenity.

Mr. Rembar: Yes, sir.

The Court: This involves the same book.

Mr. Sullivan: 17 Mass.

The Court: I will take a recess and look them over.

(Short recess.)

The Court: Gentlemen, in reality, these are reports concerning the morality standards, or lack of morality standards, of England. Of course, we have to go by our particular community in the Comomnwealth of Massachusetts. However, these were printed in LIFE and I probably should take judicial notice that LIFE has a large circulation in Massachusetts.

I think I will admit them. Then you will have to argue, gentlemen, if they are helpful or not in deciding the issue before me. Just a cursory reading of them indicates that these late events are quite different than those detailed in the book.

Mr. Sullivan: Will the Court save my rights?

The Court: Yes.

I will mark the LIFE Magazine Exhibit B.

(June 21, 1963 issue of LIFE Magazine marked Exhibit B.)

[fol. 89] The Court: Boston Record-American, July 1st, 1963, Exhibit C.

(Photocopy of Page 5, Boston Record-American for July 1, 1963, marked Exhibit C.)

The Court: Boston Record-American for July 23, 1963, two pages, Exhibit D.

(Photocopies of Pages 3 and 25, Boston Record-American for July 23, 1963, marked Exhibit D.)

The Court: Boston Record-American, July 25, 1963, two pages, Exhibit E.

(Photocopies of pages 3 and 33, Boston Record-American for July 25, 1963, marked Exhibit E.)

The Court: Boston Record-American for June 29, 1963, two pages, Exhibit F.

(Photocopies of pages 3 and 4, Boston Record-American for June 29, 1963, marked Exhibit F.)

The Court: Boston Globe for July 25, 1963, Exhibit G.

(Photocopy of page 10, Boston Globe, July 25, 1963, marked Exhibit G.)

The Court: Boston Traveler for July 23, 1963, Exhibit H.

(Photocopy of page 13, Boston Traveler, July 23, 1963, marked Exhibit H.)

The Court: Boston Traveler, July 23, 1963, Exhibit I.

(Photocopy of page 12, Boston Traveler, July 23, 1963, marked Exhibit I.)

[fol. 90] The Court: It will be noted that all those photostatic copies of the newspaper articles and the article in LIFE Magazine are admitted over the objection of the Commonwealth, and the Commonwealth has excepted to the admission of each. This action is not being brought by the Commonweath—it is brought by the Attorney General of the Commonwealth.

Mr. Sullivan: The Attorney General's exception.

The Court: All right.

Walter Minton, Sworn

Direct examination:

By Mr. Rembar:

Q. Would you please state your name and place of residence?

A. Walter Minton; I live in Saddle River, New Jersey.

Q. Are you an officer of the corporation which is the intervener here?

A. I am the president of G. P. Putnam's and Sons.

Q. What is G. P. Putnam's and Sons?

A. We are publishers of books.

Q. How long has Putnam's been publishing books?

A. Since 1838.

Q. How long have you been president of Putnam's?

A. I have been president of Putnam's for nine years.

Q. Would you name some of the authors that Putnam's has published over the century and a quarter?

Mr. Rembar: Objection, your Honor.

The Court: I will allow it.

[fol. 91] A. Putnam's has always operated in New York and, as a Middle Atlantic publisher, in our early history, we

have published some of the writers of the New York school, including Washington Irving, James Fennimore Cooper; not from New York, but Edgar Allan Poe; Herman Melville; in more recent years, Sholem Asch; Vladimir Nabokov. We distribute books of Pearl Buck.

Q. Prior to the publication of "Memoirs of a Woman of Pleasure," had Putnam's ever been involved in an obscene case?

The Court: What is the purpose, please?

Mr. Rembar: I want to show the standing and reputation of the firm that published this book, your Honor.

The Court: This action is against the book itself, not against the publisher.

Mr. Rembar: Very well.

Q. After you published this book, did you receive any orders for it from colleges or libraries?

A. A considerable number.

Q. Can you name a few of the colleges?

A. Off the top of my head, I would be hard pressed, other than that I know in the Boston area we had almost immediate orders from the Widener Library at Harvard, from the library at M.I.T., and from a great many other, although, specifically, there is a list. We have compiled these, but I can't remember exactly.

Q. Your answer is sufficient. After the publication of this book, did you receive a communication from the Library of Congress?

A. As I remember, we had two communications: one, that we had not filed a copy of the book in the Library of Congress, which we would ordinarily do for copyright purposes, and they wanted one for the Library; then, of course, later on, there was a request to translate the book into Braille, which the Library of Congress does with a number of books it deems of general interest.

[fol. 92] Q. Was this book distributed through the ordinary channels of distribution that Putnam's employs for its list generally?

A. Yes, sir, through our normal bookstore accounts and through wholesalers who service many smaller bookstores as well as supplying public and college libraries.

Mr. Rembar: That's all.

Mr. Sullivan: I have no questions.

IRA KONIGSBERG, Sworn

Direct examination.

By Mr. Rembar:

Q. Mr. Konigsberg, will you please give us your full name and place of residence?

A. My name is Ira Konigsberg, and I live in Concord, Mass.

Q. What is your occupation, Mr. Konigsberg?

A. I am an Assistant Professor of English and American literature at Brandeis University, Waltham.

Q. How long have you been teaching literature?

A. Nine years.

Q. Do you have any specialties within the field?

A. Yes, 18th century literature, particularly the 18th century novel.

Q. Are you at work on a book concerning the 18th century novel?

A. I am finishing at present a book that deals with the early 18th century novel—that is, the years from 1700 up through 1740's; to be more specific, 1753 is where I stop.

Q. The book in issue here, then, comes at the very end of that period?

A. Yes, that's right.

Q. You have read the book, I assume?

A. Yes.

[fol. 93] Q. Do you have an opinion as to its literary merit or other values?

A. Yes, I do.

Q. Would you please state that opinion?

A. My opinion is that it is an extremely significant literary work, and I base that opinion upon three standards. One is that it is significant as a literary document for a modern day reader; two is that it is significant as a literary document in the history of English literature; and three, that it is an extremely important literary work in terms of the moral values that a literary work can advocate.

I can explain those three a little more specifically if you want.

Q. I wish you would.

A. In terms of its literary value for the contemporary reader, the work is one of those rare things, it is a novel that succeeds. When I say that it is a novel that succeeds, I mean it fulfills all the requirements of serious literature and serious novel writing.

It primarily attempts to create an illusion of reality for the reader through the creation of realistic characters, realistically portrayed in a semi-credible or realistic situation.

Secondly, it is an organized, shaped, patterned work of art. It has all the elements in it—the various episodes, the chapters, are all unified together for one specific end, and that is the writing of a complete work of art itself.

On these standards, I think it succeeds, and it succeeds extremely well.

In terms of its historical importance, I think it is extremely significant that this particular novel was published in 1749; that is the year that Fielding's "Tom Jones" was published. With Fielding's work "Tom Jones," Cleland's "Memoirs of a Woman of Pleasure" is a very specific reaction to a kind of literature that was published at the time, that is, the novels, in particular, of Samuel Richardson. [fol. 94] Cleland is part of what I should call this cultural battle that is going on in the 18th century, a battle between a restricted Puritan, moralistic ethic that attempts to suppress freedom of the spirit, freedom of the flesh, and this element is competing with a freer attitude towards life, a

more generous attitude towards life, a more wholesome attitude towards life, and this very attitude that is manifested in Fielding's great novel "Tom Jones" is also evident in Cleland's novel.

This work is of extreme importance in this aspect. In fact, Cleland himself echoes parts of Richardson's works.

As you know, Richardson wrote two novels. His first novel, "Pamela," is the first English novel, first modern English novel, and this was published in 1740. The second work Richardson wrote was "Clarissa" which was published 1747 to 1748. Cleland's work, with "Tom Jones," comes in 1749.

Q. Excuse me—you say Cleland's work with; you mean Cleland's work and "Tom Jones"?

A. Both published in 1749. I will make this brief.

"Pamela" is the story of a young country girl; "Clarissa" is the story of a woman trapped in a house of prostitution. Obviously, then, Cleland takes both these themes, the country girl, her initiation into life and into experience, and the story of a woman in a house of prostitution, and what he simply does is to take the situation and reverse the moral standards.

Richardson believed that chastity was the most important thing in the world; Cleland and Fielding obviously did not and thought there were more important significant moral values.

So, just to sum up this point, the work is of historical importance, one, because it tells us about a cultural conflict in the 18th century; two, because it tells us something about the literary plots and character types that were being used. [fol. 95] To add a footnote to that, there is a long tradition of the young girl coming from the country and being brought to a brothel and being experienced into life. These works are readily available in libraries, and Cleland's work is part of this tradition. It begins in 1677 with the play by John Leonard, "Country Innocents;" it goes right up until Lillo's play, in 1738, "Marina." All of these deal with simi-

lar situations. Cleland then is taking a very typical literary plot and very typical literary characters that are prevalent in the literature of this period and he is using them in the situation that the common reader of the period would be used to, only he is infusing his own particular moral ethic.

And thirdly it is important historically because it tells us something about the development of the English novel as a literary form.

This cannot be emphasized enough. Before 1740, there is simply no modern English novel. The works of Daniel Defoe that are published throughout the first few decades come closest, but they lack what Cleland's novel possesses, and for this reason Cleland is one of the first three English novelists, or the first three writers of English fiction to write what we today call a modern novel.

Q. Mr. Konigsberg, when you say Defoe's works lack what Cleland's work possesses, what do you have in mind?

A. Well, very simply, DeFoe's works are the culmination of a tradition in English fiction, a culmination of a tradition which I think we best call the fictitious history. He is working along these lines; he brings a few further elements to it.

What Richardson introduces to the novel is an extensive amount of psychological realism, a specific creation of emotional qualities. In other words, he is emphasizing the humanistic qualities of his characters, the realistic qualities of them as real people.

Q. You find this in Cleland's work as well as Richardson's?

A. Cleland's work as well as Richardson and Fielding.

So, in the presentation, then, of realistic characters and realistic situations with emphasis upon emotional reac- [fol. 96] tion and emphasis upon psychology, Cleland is right there at the beginning, and his work is extremely significant in this way.

Secondly, stylistically—I should say fourthly at this point—the work is important in telling us something about the literary history of the novel. The prose style which has

been referred to by the previous witnesses has been called typical of the 18th century and highly artificial. What has not been specifically stated is the way in which Cleland uses this prose style and which makes him such a remarkable, I think, literary figure, at least literary stylist of the novel. That is, within the framework of the traditional 18th century prose style which is sort of a free, loose, yet at the same time balanced kind of sentence, he is on the one hand creating for us remarkably realistic sense, particular sense in a novel extremely realistically portrayed, and on the other hand creates for us a kind of impressionistic writing.

That is, many of the scenes, I go so far as to say most of the scenes, are portrayed to us as Fanny sees them, and what is generally called common metaphor becomes in her hands, or rather in her language, a means of expressing exactly how she feels to the experience. This also is simply not done in this period.

So, in all of these bases, I claim that this is an important novel. Cleland is not one of the six major novelists of the period, but he is significantly better than the rest of the minor figures. He somehow falls short of Richardson, Fielding, and Defoe, but if you have read novels of the minors, Mrs. Haywood, Sterne, he is supremely superior to them.

The third and last point I want to make is that I think it is an important literary book because, if you consider that serious literature must itself make some kind of serious statement about life and experience, I think this book does, and I think it is extremely important to us as a literary document in this period.

In our own culture, which is advocating, through films and through TV plays, an unhealthy attitude towards the human body—

[fol. 97] The Court: Just a moment. He is arguing now.

Q. Mr. Konigsberg, let me go back for a moment. In describing the early development of the novel, you said that there were two rather antithetical ideas, a sort of a

contest between these early novelists. I want to make sure I understand who is on which side.

A. I wouldn't call it a contest. May I just specifically give you the context of this sort of cultural battle concerning life? We can begin with the Commonwealth. The Commonwealth is the period of extreme suppression of, you know, freedom of life.

Q. You are referring to the Commonwealth in 17th century England?

A. 17th century. It is followed, of course, by the Restoration, which is a reaction to that, which is an excessive kind of libertine life and excessive sexual freedom. This is followed by a very significant middle class reaction, the beginning of the 18th century of which Richardson, you know, is part. That is, it has its Puritanical emphasis upon chastity as a reaction to the kind of Restoration, or cavalier, attitude towards life. In reaction to the kind of thing Richardson is doing, you have Fielding and Cleland who are trying to advocate again a more wholesome view of life itself and the relationship between the sexes.

If I could just make this last point, in relation to that, in relation to the point I was going to make, and that is that the book—

The Court: Just a moment. Keep the witness under control, please.

Mr. Rembar: The witness has said he would like to make one last point in relation to that.

The Court: I know it. You are the gentleman who has to argue the case.

Mr. Rembar: I think, your Honor, that he is helping me with my argument by putting this book in its proper historical context.

[fol. 98] The Court: Let's abide by the rules of evidence, the rules of law in the presentation of cases in court.

Mr. Rembar: I submit, your Honor, that under the law, as presently established, the place of any work in its historical context is of the utmost importance.

The Court: You just proceed and ask questions of the witness.

Q. Mr. Konigsberg, you referred to the attitude toward sex which you find manifested in John Cleland's book. It may be helpful to us if you would compare that with the attitude towards sex manifested in the contemporary novel, or in a good many contemporary novels.

Mr. Sullivan: I object, your Honor.

The Court: That's just a statement, that it might be helpful if you compare it?

Mr. Rembar: I would like him to compare it. I would like his opinion. He has been qualified as an expert on it, in this field. I would like his opinion of the literary treatment of the subject matter of this book as compared with the literary treatment of the subject matter of various contemporary novels.

The Court: Well, your various contemporary novels—

Mr. Rembar: I mean contemporary novels that deal with the subject of sex, which this book does.

Mr. Sullivan: We don't have any of those before the Court, your Honor.

Mr. Rembar: They are part of our culture, your Honor, and if any book is to be evaluated, it must be evaluated in relation to other things that constitute part of that same culture.

[fol. 99] The Court: Yes, but you are asking about other contemporary novels. I have to have some idea what books you are referring to.

Mr. Rembar: All right. I will refer to "Giovanni's Room" by James Baldwin, to "Run, Rabbit, Run" by John Updike, to "The Group" by Mary McCarthy, to "The Naked and the Dead" by Norman Mailer, to "From Here to Eternity" by James Jones.

The Court: What is your question?

Mr. Rembar: My question is this: how in the opinion of this witness does the treatment of sex in these modern novels compare with the treatment of sex in the novel before the Court?

Mr. Sullivan: I object, your Honor.
The Court: I will allow it.

A. Yes. The treatment in Cleland's novel is obviously more healthy, and this can be simply substantiated by a comparison of his text.

The Court: More healthy?
The Witness: Yes, sir, more healthy. This is towards sex, the question is.

A. (Continuing) This can be substantiated by a comparison of this text with the texts you mentioned. "Giovanni's Room," which is a well-known novel, is about homosexuality. The other novels deal with various kinds of love in modern 20th-day society, and it is generally treated ruthlessly. That is, the relationship between the sexes is seen as another manifestation of modern decadence, insterility or perversion.

Cleland's point simply is this, that, with love, the relationship between men and women can be a wholesome, healthy, experience itself.

I would just like to read two very brief sections from the novel to substantiate my point, right here from the novel itself.

[fol. 100] Q. If they are brief enough.

A. Extremely brief. One is in the hard cover edition, Page 293, and remember this is a novel that deals with the development of a heroine, and this is the culmination of her experience—

The Court: What about the three other girls whose history is given in the book besides Fanny? Remember about three other associates of hers in whatever you might call her calling?

The Witness: Yes. Well, actually, they are dealt with similarly in a complex manner. If I recall, the three of them end up well. One ends up married and the other two do end up happy, but various aspects of their professional life are attacked by Fanny at various times in the novel

as being perverse or in bad taste or without love, and, when they do undergo these experiences—for example when one of the girls dresses as a man and ends up with another man, Fanny is quite willing to expose this as in poor taste. Yet, when the actual relationship with men is one composed partly of love, then she is willing not to condemn it but to appreciate it, and the same standard is held with these other women.

The Court: Would you say these three other girls told about their experiences with a sense of pride?

The Witness: No.

The Court: Sense of exaltation?

The Witness: I wouldn't use those particular words. I think they are too strong for that. I know the section you refer to. I think those words are too strong.

The Court: Well, go ahead.

A. (Continuing) The reference I make is on Page 293 of the hard cover edition, when she says:

> [fol. 101] "Love that may be styled the Attic salt of enjoyment; indeed without it the joy, great as it is, is still a vulgar one, whether in a king or a beggar, for it is undoubtedly love alone that refines, enobles and exalts it."

This to me certainly is not an unhealthy attitude.

Q. Not an unhealthy attitude?

A. Is not an unhealthy attitude. What Cleland is trying to do is to advocate a healthy relationship between men and women, one based upon respect for physical wellbeing, and, in reference to the books you have mentioned as well as our general culture, we have an emphasis today upon violation of physical being, upon grotesqueness, upon various kinds of physical injury and harm. This is very prevalent in the modern novel as well as in other art forms.

What Cleland is saying is just the opposite, that the human body is something that is wholesome, that is healthy, that is normal, and that is beautiful, and when people come

together in love, then in the experience itself is something that is wholesome.

The Court: What about the whipping incident?

The Witness: That, too, is held up.

The Court: The homosexual incident?

The Witness: Yes, sir.

The Court: The Lesbianism.

The Witness: They fit into the pattern. The homosexual incident is held up with scorn. It is undercut throughout by a very strong comic element. The same can be said of the whipping. She reacts violently to both of them.

If we consider the work as a whole, these acts of sexual perversion are there to be juxtaposed to the acts which are partaken in sexual health. Otherwise, the point couldn't be made.

[fol. 102] The Court: Would you describe the description given by the author of these acts as pornographic?

The Witness: Could you tell me what you mean by pornographic?

The Court: You don't know what I mean?

The Witness: I don't know what you mean. I know what I would mean by pornographic.

The Court: If you don't know, you need not answer.

Mr. Rembar: I don't have any further questions of this witness.

Cross examination.

By Mr. Sullivan:

Q. Did I understand you to say that the third category of why this book was extremely valuable was because it had moral value?

A. Yes.

Q. And I think you further said that other books in this period that you yourself are writing on at this time—

A. That's right.

Q. Is this a novel you are doing?

A. It is a book on the novel, scholarly book on the novel.

Q. —are available from this period?

A. Yes.

Q. Do they deal with sex in the same way that "Fanny Hill" deals with sex?

A. I can answer that with a qualification. The qualification is no two books can handle sex the same, but they do have a similar emphasis upon sexual matters, yes.

Q. So you could writ your scholarly work without the benefit of "Fanny Hill"?

A. Yes, I could, although it would be—

[fol. 103] Mr. Sullivan: I have no further questions.

The Court: All right; that's all.

Mr. Rembar: Your Honor, that concludes the intervener's case.

The Court: Is the evidence all in?

Mr. Sullivan: Yes, your Honor.

The Court: Do you want to argue this afternoon or tomorrow morning?

Mr. Rembar: This afternoon, if your Honor pleases.

The Court: All right. We will take a short recess.

(Recess.)

ARGUMENT BY MR. REMBAR

Mr. Rembar: If the Court please, the testimony given here today must be weighed in the light of what the United States Supreme Court has said about the matter of obscenity.

As the Court knows, the intervener has waived every defense except the defense that this book is protected under the guarantee set forth in the First Amendment. It is not really very long since the time when the Supreme Court declared that if a book is challenged under an anti-obscenity statute, the question is a First Amendment question.

That was indicated first in 1956 in the case of Butler vs. Michigan, where the Supreme Court said that a book might not be suppressed on the ground that it might be harmful to children.

The next year, in the twin cases of United States vs. Roth and Alberts vs. California, the Supreme Court considered the problem generally, and it is important to note just how generally the Supreme Court viewed those cases. They [fol. 104] came to that Court on certified questions, and the questions were simply these:

Are the statutes under which the defendants were convicted in those cases, on their face, in toto, unconstitutional? Counsel for Roth and Alberts both took the position that there can be no anti-obscenity legislation, that such legislation flies in the face of the absolute prohibitions contained in the First Amendment.

The Court considered only that question. It did not consider whether the materials involved were in fact obscene or in law obscene. It considered only that single question, can anti-obscenity legislation under any circumstances have a constitutional application?

The answer of a majority of the Court was Yes. Four judges dissented. The five-judge majority, however, said Yes with a very important qualification, and that was that such statutes have only the narrowest application.

The Court set up several tests for what might be deemed obscene, but its primary view of the matter resulted in what has come to be known as the social value test, a test which a majority of the Supreme Judicial Court of this state has declared to be the law.

That test is this: does a work which is challenged have any redeeming social value? That value, as the Court pointed out, might take many forms. It might be scientific, it might be political, it might be artistic, it might be literary, but if it has any such value, the Court, held, then in the constitutional sense the book is not obscene. The phrase used by the Court was that a book might be held to be obscene if it is utterly without redeeming social value.

The Court went on and set up an additional test for obscenity, and that is the criterion of whether the book, taken as a whole in the light of contemporary community standards and viewed in its impact on the average man,

predominantly appeals to prurient interest. This, we submit, is an additional test. That is, if the opinion of the [fol. 105] Supreme Court is properly read and the answer to the social value question is in the affirmative, that is the end of the case. If it is in the negative, then, before a book may be found obscene, it must still fail by this prurient interest test.

A few years later, the Court added still a third test. This was in the case of the magazine called "Manual Enterprises," which was a magazine obviously designed, as the Court pointed out, to appeal to a homosexual audience and to create a response on the part of homosexuals. Nevertheless, even though this book would flunk the social value test, it passes another test, and that test the Court called patent offensiveness. They said that a book must, on the face of it, be offensive, regardless of what may lie underneath.

All three of these tests were noted and followed by a majority of the Supreme Judicial Court in the case involving "Tropic of Cancer".

Reviewing these tests in reverse order, so far as patent offensiveness is concerned, this book, despite its subject matter, is on its surface not offensive. It is not coarse or gross or vulgar. On the contrary, it is on the surface of it, at least, elegant.

So far as prurient interest is concerned, what Supreme Court meant by that can really only be found by considering the Supreme Court's actions in subsequent cases, and, in subsequent cases, the Supreme Court unanimously and per curiam reversed holdings against publications on the part of lower courts.

I respectfully refer this Court to the description of the materials involved in those cases that are found in our brief. I submit that a comparison of what was involved in those cases with what is involved in this case shows that the book at issue is clearly safe under the prurient interest test.

Now, as I pointed out to your Honor, our position with respect to evidence is that testimony is inappropriate on the question whether the dominant appeal of a book is to prurient interest or whether it is obscene; these, we submit, [fol. 106] are legal conclusions. Testimony is appropriate, however, in order to show the facts that shed light on contemporary community standards, and it was with that in view that we submitted the newspapers and the magazine that are before the Court. It was with that in view that we asked witnesses about other books which are currently published.

There I wish to emphasize, your Honor, that we did not bring in the cheap junk that you see on newsstands, that I saw only this morning on Washington Street, where the Attorney General might properly answer, "The only reason that material is not in court is that we don't have time."

I am not saying that that sort of comparison should be made, but I am saying that a comparison may well be made with current works of fiction that are published by reputable publishers, sold in respectable bookstores, and generally accepted as works of literature in the literary world.

When that comparison is made, as our witnesses have testified, the treatment of the subject matter in this case is seen to be much less extreme, much less brutal, much less explicit than what the public is currently reading.

Finally, our evidence dealt with the matter of social value, and here it was opinion evidence. Social value as shown by the presence of literary merit or historical significance is that redeeming social importance that the Supreme Court has said the First Amendment protects. Whether or not a book has literary merit is a fit subject for expert opinion testimony. Just as in a personal injury case the Court hears physicians give their opinion as to the nature and extent of injuries, so in a case dealing with literature the Court may hear qualified experts give their opinion as to whether the book has merit.

On cross-examination of the intervener's witnesses, something was made of the fact that this book deals in great

measure with sexual activities. We submit that under the decisions of the United States Supreme Court and the Su-
[fol. 107] preme Judicial Court, there is no subject matter as such which is forbidden to the artist. The only question is, "How does he deal with it?" Does he deal with it in such a way that his product can be said to be a work of art or a work of literature? If so, that is the end of the matter. There is nothing which is foreclosed to the inquiring mind or to the pen of the writer, nothing in terms of subject matter.

Finally, I would say a word about the testimony of the witness for the Attorney General. I would submit that, in spite of his statement that he read the book last night, he displayed a rather appalling lack of familiarity with its contents.

In addition, while he testified that the book before the Court is obscene, prurient, offensive, and indecent, his understanding of those words is demonstrated by the fact that he would apply each one of them to a book which the Supreme Judicial Court has held to be not obscene. That book, of course,—

The Court: By a four to three vote.

Mr. Rembar: Still binding on this Court, your Honor. And I would call to your Honor's attention that it is only by a five to four vote that any anti-obscene legislation still stands on our statute books.

Thank you.

ARGUMENT BY MR. SULLIVAN

Mr. Sullivan: I would first like to point out to your Honor that this action is brought by the Attorney General in a request to the Commission against Obscene Literature, duly constituted body of the Legislature of this Commonwealth, under the provisions of Chapter 272 of the General Laws.

The intervening defendant has waived his statutory rights, and I would specifically note Section 28 of the said

Chapter 272 which relates to the distribution to a person under the age of 18 years.

[fol. 108] Under the Roth case coming up from California and the Alberts case, I believe, coming up from Pennsylvania, there was established and reserved to the states the power to enact anti-obscenity legislation and to constitutionally prohibit obscene literature through state enactment.

Our statute uses the words "obscene," "impure," and "indecent". I do not feel that any witness could in good conscience say that this book did not fall into the categories of those three words.

Again relating to the statute, we are dealing here with an equity proceeding. The matters before the Court are to aid you in your judgment of this book.

I would like to point out that the intervener's witnesses, albeit, I am sure, all intelligent men, and I respect them all for their ability and their minds, come from one walk of life. We had no witnesses from the housewives, the husbands, the many and varied facets of our community to whom this book is available. We are therefore dealing with literary men whose testimony is weighted towards the fact that this book has some social value, that it has some literary merit. Of course they are going to say it; this is their field of employment and work.

Further, on the question of these witnesses and the test of social value, the question of being utterly without social value or unredeeming is a question that is not clearly stated by the Court. They do not take into account a balance. It is not clear whether they say that if the book is obscene then we may look to the question of social value.

The patently offensive test coming out of California relates to a criminal code in California which is all that the Supreme Court had before it and which criminal code is dissimilar to the statutes in this Commonwealth.

I necessarily read this book prior to trying this case. I am not a literary expert, although I did major in English in college. I am not one easily offended, but I was offended

by this book, and I feel there is no literary merit in it. It [fol. 109] did arouse prurient interest and impure thoughts in me. Fortunately I am well adjusted enough so it did not affect my daily life, but I wonder if that could be said for everyone who has access to a book of this nature.

Thank you, your Honor.

The Court: This is the type of case where, as counsel pointed out, there is a great difference of opinion as to facts and the weight to be given. The United States Supreme Court divided on a five to four decision; the Supreme Judicial Court divided by four to three. Each case is different; it depends on different facts. Of course, I have to give this quite a lot of study before I make my findings.

I was interested in the foreword of the book where Mr. Quennell quotes James Boswell in 1772 as calling this book the "most licentious and inflaming book." I guess they have differed about this book since 1749.

You have presented a real problem to me, gentlemen, and I will have to take my time.

(Hearing adjourned at 3.15 o'clock P.M.)

Stenographer's Certificate to foregoing transcript (omitted in printing).

[fol. 110]

FINDINGS OF FACT, RULINGS OF LAW AND ORDER FOR FINAL DECREE—entered September 3, 1964

1. Thirty years after the adoption of the First Amendment and forty-seven years before the adoption of the Fourteenth Amendment to the United States Constitution, the book entitled "Memoirs of a Woman of Pleasure", written by John Cleland in 1749 was adjudicated obscene by the Massachusetts Supreme Judicial Court in the case of *Commonwealth* v. *Holmes,* 17 Mass. 336, decided in 1821. The *Holmes* case is said to be the first recorded book suppression case on the grounds of obscenity in American history, although, as early as 1712, Massachusetts made it a crime to publish any filthy or obscene "pamphlet."

2. Now, the Attorney General of the Commonwealth has brought the petition in this case under the modern statutes found in General Laws, c. 272, §§ 28C to 28H, inclusive, as amended by St. 1945, c. 278, praying that it be judicially determined that the book is obscene, indecent and impure. The present publisher of the book, G. P. Putnam's Sons of New York, has intervened as a party respondent as permitted by those statutes. It prays that the Court first determine that the book is not obscene, indecent and impure, and, secondly, to enter a declaratory judgment to the effect that (a) a sale or distribution of the book is protected by the First Amendment to the United States Constitution as applied to the States by the Fourteenth Amendment and that (b) any application by the Attorney General of General Laws, c. 272, §§ 28C to 28H, if it results in an adjudication that the book is obscene, indecent or impure, or any acts to suppress its sale or distribution, would be unconstitutional under the two federal constitutional amendments cited.

3. The freedom of expression guaranties of the First Amendment to the United States Constitution are similar in kind to Article XVI of the Massachusetts Constitution, adopted far ahead of the First Amendment. Article XVI originally provided that "(T)he liberty of the press is essential to the security of freedom in a state: it ought not, therefor be restrained in this Commonwealth," and in 1946-1947 an addition was made to it which reads: "(T)he right of free speech shall not be abridged." As the United States [fol. 111] Supreme Court did many years later in the case of *Roth* v. *United States,* 354 Mass. 476 (1957), the Massachusetts Supreme Judicial Court held as early as 1838, in an opinion written by Chief Justice Shaw in *Commonwealth* vs. *Kneeland,* 20 Pick. 206, 219 (37 Mass. 206), that the right of free press did not give an unrestricted license to anyone to print anything and that it was not a denial of such freedom for the legislature to enact laws, like our statute on blasphemy, for the common good and for the

protection, safety, prosperity and happiness of the people. While reference has been made in the briefs as to the state's constitutional powers, the intervener in its brief has waived any rights of protection under the Massachusetts Constitution and has taken no position as to the proper construction of the pertinent Massachusetts laws apart from the limitations on such construction as are imposed by the First Amendment to the United States Constitution. This leaves as the main issue: Is this book, "Memoirs of a Woman of Pleasure" protected by the guaranties of said First Amendment?

4. Upon the filing of the petition and in accordance with General Laws, c. 272, § 28C, on February 10, 1964, a justice of this Court examined the book by reading and studying its entire contents and was of the opinion that there was reasonable cause to believe that the book was obscene, indecent and impure. Thereupon, he ordered the issuance of an order of notice to be made by publication and registered mail, against the book and addressed to all persons interested in its publication, sale, loan or distribution, to show cause why the book should not be judicially determined to be obscene, indecent and impure. After the issuance of the order of notice, he entered an interlocutory decree finding and adjudicating that the book was obscene, indecent and impure under the provision of said General Laws, c. 272, § 28C. Appearances and an answer were filed by the intervener, G. P. Putnam's Sons, the publisher and the holder of the copyright of the book and interested in its sale, loan or distribution. It was agreed in the answer that the book was on or about the date of the filing of the petition "imported, sold and distributed in the Commonwealth." The edition sold was a paperback edition, selling at ninety-five cents a copy.

5. The hearing on the merits under the provisions of General Laws, c. 272, §§ 28C to 28G, as amended by St. [fol. 112] 1945, c. 278 took place on May 27, 1964. Upon its

conclusion, counsel were given until June 19, 1964 to file additional briefs (trial briefs had been filed). However, on June 22, 1964, the United States Supreme Court filed decisions in four new obscenity cases, each with majority and minority opinions: and, on July 10, 1964, the Court of Appeals of the State of New York decided by a five to four vote that "Memoirs of a Woman of Pleasure" was not obscene. During the month of July other obscenity suppression cases were decided by the highest courts of Illinois and Florida. New briefs and memorandum continued to be given to the Court by counsel as such cases were decided and reported.

6. At the trial, the book was introduced in evidence. Persons who qualified as literary experts testified and photostatic copies of American magazine and newspaper reports of sexual life and episodes in this country and in England were admitted in evidence. During the course of the hearing, the expert witness for the Commonwealth, who was of the opinion that "Memoirs" had no or little literary merit, was asked by the intervener's counsel if he agreed with the opinion of the book as stated in the New York Sunday Times Book Review written by J. Donald Collins in the edition of July 28, 1963, and counsel for the intervener offered a copy of the article as an exhibit. Upon objection by the Attorney General, I excluded the article as evidence on the ground that it was a hearsay opinion of a purported literary expert, not in court and, of course, not under oath or subject to cross-examination. Exception being taken, counsel for the intervener made an offer of proof submitting as his offer a copy of the article which was subsequently marked Exhibit 1 for Identification and is printed in the transcript in full. The same course was followed for the same reasons relating to three other documents: (a) the article entitled "The Harlot's Progress" by V. S. Pritchett in the October 31, 1963 edition of the New York Review of Books, which, in an offer of proof, became Exhibit 2 for Identification; (b) the article en-

titled "Mersey Sound, 1750" by Brigid Brophy in the November 15, 1963 issue of the New Statesman, p. 710, marked Exhibit 3 for Identification; and (c) an article entitled "Task" in the Modern Living section of the August 2, 1963, edition of TIME Magazine, which became Exhibit 4 for Identification. All these articles are typed in full in the [fol. 113] transcript. I am reversing the rulings made concerning the admission of these articles and admit them as full exhibits in the consideration of the decision to be made in this case. I do so because (1) of the decision in *Jacobellis* v. *Ohio,* —— U.S. —— decided June 22, 1964, 42 L.W. 4652, holding that "contemporary community standards of decency" do not relate to state and local "communities" as such, but rather in the sense of "society at large . . . the public or people in general . . . based on a national standard" for, after all, the Supreme Court said, it is "a national Constitution that we are expounding": and (2) for the reason that to comply with this new interpretation of what the community standards of a nation are, all matter, such as judicial decisions and records of all federal and state courts, and knowledge acquired from books, magazines, news sources and other informational media relating to standards of decency throughout the United States must be considered for the determination of "contemporary community standards."

7. Justices of the United States Supreme Court (*Jacobellis* v. *Ohio,* decided June 22, 1964, 32 L.W. 4653) and justices of the highest state Courts—(Court of Appeals, State of New York, *Larkin* v. *G. P. Putnam's Sons,* decided July 10, 1964, Supreme Court of Illinois, *Haiman* v. *Morris,* —— Ill. ——, eventually decided in July 1964, and Supreme Judicial Court of Massachusetts, *Attorney General* v. *"Tropic of Cancer",* 345 Mass. 11) have concluded that in the area of law relating to obscenity suppression cases, great difficulties are encountered because each judge "cannot avoid making an independent constitutional judgment of the most sensitive and delicate kind" in determining the

facts of the particular case heard before him to ultimately decide whether the material sought to be suppressed is constitutionally protected. Despite the strong opposition of the Chief Justice and another member of the United States Supreme Court, the majority of the Court on June 22, 1964 in the *Jacobellis* case (32 L.W. 4652—1964) held that in every case of the kind now before the Court must be ultimately decided—individually, case by case, and as a matter of duty—by the United States Supreme Court, no matter how "difficult, recurring and unpleasant" the task may be to the United States Supreme Court. But it is evident that heavy responsibilities still remain upon the lower federal and state trial and appellate courts in deciding cases be- [fol. 114] fore they reach the United States Supreme Court for, in the interval, there is a duty upon the lower courts to protect, on the one hand, "society's right to protect its moral fiber" and the effective administration of justice by preventing the circulation of such pornography as the United States Supreme Court in the *Roth* and in the *Jacobellis* cases hold are not within the protection of the First Amendment; and, on the other hand, to protect publications and other materials entitled to the rights of freedom guaranteed by the First Amendment if public authorities seek to suppress them. And in carrying out these heavy responsibilities, personal predilections of a judge, his prejudices, and his preferences, including any "distaste for commercial exploitation" (*People* v. *Richmond County News, Inc.*, 9 N.Y. 2nd, 580, 588) must be particularly subverted and decisions made with cold indifference in cases of this kind.

8. We, of the Superior Court, are bound by the principles of law in the determination of this kind of a case as those principles are set forth in the majority decision in *Attorney General* v. *"Tropic of Cancer"*, 345 Mass. 11. In that case is an exhaustive survey of the United States Supreme Court and Massachusetts cases relating to obscenity suppression problems. In addition we are bound by the principles of law set forth in the more recent cases

of the United States Supreme Court that were decided both in and after the decision in the leading case of *Roth* v. *United States,* 354 U.S. 476, 488-489. The subsequent cases are: *Manuel Enterprises Inc.* v. *Day,* 370 U.S. 478; *Sunshine Book Company* v. *Summerfield,* 355 U.S. 352; *Kingsley Int'l. Pictures Corp.* v. *Regents,* 360 U.S. 684; *Jacobellis* v. *Ohio,* —— U.S. ——, 32 L.W. 4652, decided on June 22, 1964; *A. Quantity of Copies of Books* v. *State of Kansas,* —— U.S. ——, decided on June 22, 1964; *Grove Press* v. *Gerstein,* —— U.S. ——, decided on June 22, 1964, and other per curiam decisions. They have expanded somewhat, but not substantially, the law as it existed when the *"Tropic of Cancer"* case was decided by the Supreme Judicial Court in 1962.

9. The clearly established rule that obscenity, if utterly without social importance, is not entitled to the protection of the First Amendment guaranties was stated by Mr. Justice Brennan in *Roth* v. *United States,* 354 U.S. 476, 484 as follows:

> [fol. 115] "All ideas having the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. *But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. . . .*" (Emphasis supplied.)

10. The question is whether "Memoirs of a Woman of Pleasure" can reasonably and constitutionally be found to be obscene. In *Roth,* the test of obscenity in *Regina* v. *Hicklin,* L. R., 3 Q.B. 360 (1868) was rejected and the rule was enunciated that the test of obscenity was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interests." Material "appeal-

ing to the prurient interest" was defined as "material having a tendency to excite lustful thoughts" (354 U.S. 476, 487, ftn. 20). But sex and obscenity are not to be treated as synonymous, p. 487. In making this definition, the Supreme Court adopted as a supplemental definition a definition found in the 1957 tentative draft of the A. L. I. Model Penal Code. In the 1964 *Jacobellis* case, 32 L. W. 4652—1964, the Court explicitly reaffirmed in the more recent 1962 Proposed Official Draft of the Penal Code, amending the former one, so that the Code definition, as so reaffirmed, presently reads as follows:

> "Material is obscene if, considered as a whole, its predominant appeal is to the prurient interest, i.e., a shameful or morbid interest in nudity, sex or excretion and if, *in addition,* it goes *substantially* beyond customary limits of candor in describing or representing such matters." (Emphasis supplied.)

11. These definitions of obscenity applicable to the standard required to determine what is and what is not constitutionally protected material have been the subject of much discussion and controversy. The enunciated standard resting upon the definitions was held by the Chief Justice and two other justices of the Massachusetts Supreme [fol. 116] Judicial Court in the dissenting opinion of *Attorney General* v. *"Tropic of Cancer",* 345 Mass. 11 at 22 as "too dim a beacon by which to guess a course." This comment must have come to the attention of the Supreme Court for the case is cited in a footnote in the *Jacobellis* case. In *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58, 66, it was said that what separates obscenity from constitutionally protected expression requires ascertainment by a "dim and uncertain line." In *Jacobellis,* the United States Supreme Court recognized that its definition of obscenity in the *Roth* case "is not perfect (but) we think that any substitute would raise equally difficult problems and we therefore adhere to that standard." Chief Justice Warren in the

minority opinion in the *Jacobellis* case wrote in this connection:

> "For all the sound and fury that the *Roth* test has generated, it has not been proven unsound, and I believe that we should try to live with it—at least until a more satisfactory definition is evolved."

12. In *Attorney General* v. *"Tropic of Cancer"*, 345 Mass. 11 at 19, the majority concluded that "with respect to the material designed for general circulation, only predominantly 'hard core' pornography, without redeeming social significance, is obscene in the constitutional sense." This conclusion has been reached by a number of other courts. Some of these opinions are referred to in the concurring opinion of Mr. Justice Stewart in the *Jacobellis* case (32 L.W. 4652) a case wherein Mr. Justice Stewart said: "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (of pornography): and, perhaps, I could never succeed in intelligently doing so. . . . But I know it when I see it and the motion picture involved in this case is not that." Chief Justice Warren in the dissenting opinion in the *Jacobellis* case wrote: "We are told that only 'hard core pornography' should be denied the protection of the First Amendment. But who can define 'hard core pornography' with any greater clarity than 'obscenity'? And even if we were to retreat to that position, we would soon be faced with the need to define that term just as we are now faced with the need to define 'obscenity'. Meanwhile, those who profit from commercial exploitation of obscenity would continue to ply their trade unmolested."

[fol. 117] 13. With the interdiction of the Massachusetts Supreme Judicial Court in the "Tropic of Cancer" case (345 Mass. 11, 19) that only predominantly "hard core" pornography, without redeeming social significance, is obscene in the constitutional sense and the misgivings relating to the clarity of definition of that kind of obscenity ex-

pressed by Chief Justice Warren and Mr. Justice Stewart, the trial court is faced with the task of explaining what 'hard core' pornography is. This Court cannot make a definition of it in a single sentence. A composition of statements defining "hard core" pornography, gained from decisions (such as *People* v. *Richmond County News, Inc.*, 9 N.Y. 2nd 586) and writers on the subject, demonstrates that it is that kind of obscenity that "focuses predominantly upon what is sexually morbid, grossly perverse and bizarre without any artistic or scientific purpose or justification." It is recognizable "by the insult it offers, invariably to sex and the human spirit" (D. H. Laurence, *Pornography and Obscenity* (1930), p. 2) and it is to be differentiated from the bawdy and the ribald. It depicts "dirt for dirt's sake." "It depicts that type of obscenity that is vile, rather than course, and is a blow to the senses rather than to the sensibilities." It smacks of licentious fantasy and unreality, of orgiastic exhibitions of sexual episodes, of sexual perversion and sickness and represents a "debauchery of the sexual faculty." "It involves a kind of 'pandering' or 'commerce in the obscene", *Attorney General* v. *"Tropic of Cancer"*, 345 Mass. 11, 19. A pornographic book "is one deliberately designed to stimulate sex feelings and to act as an aphrodisiac." (St. John-Stevas, *Obscenity And The Law*, p. 2) and is commonly a series of increasingly erotic and libidinous scenes without distracting non-erotic passages.

14. In the *Roth* definition of obscenity, 354 U.S. at 489, the test is whether to an average person, *applying contemporary community standards,* the *dominant theme* of the material taken as a whole appeals to the prurient interest. (Emphasis supplied.) It is to be noted that in the *Jacobellis* case, decided on June 22, 1964, 32 L.W. 4652, that it is incorrect to read the section in the *Roth* rule to mean the standards of a particular local community or even a state. The Court considered that it was an "intolerable consequence" that "some sections of the country (could have)

access to material there deemed acceptable, which in others [fol. 118] might be considered offensive to prevailing community standards of decency." Constitutional status of allegedly obscene materials must be determined on a national standard.

15. In *Manuel Enterprises Inc.* v. *Day,* 370 U.S. 478, the United States Supreme Court, in an opinion written by Mr. Justice Harlan, made it clear that obscenity is not to be determined solely by the appeal to the prurient interest formulated in the *Roth* case. *Manuel Enterprises* holds that, in addition to the "prurient interest test", it is necessary to prove that the challenged material is also "patently offensive" as judged by current community standards of decency. In the *Manuel Enterprises* case—one involving magazines published for the homosexual market and distributed through the mails—Mr. Justice Harlan said that an erroneous view of obscenity "stemmed from the belief that in *Roth* v. *United States,* 354 U.S. 476, 489, this Court established the following *single* test for determining whether the challenged material is obscene: 'whether to the average person applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interests' ". Later he stated in the opinion: "The Court of Appeals . . . was mistaken in considering that *Roth* made "prurient interest' appeal the sole test of obscenity." (370 U.S. 478, 486) The additional test imposed by the *Manuel Enterprises* case was stated therein as follows:

> "These magazines cannot be deemed offensive on their face so as to affront current community standards of decency . . . a quality that we shall hereafter refer to as 'patent offensiveness' or 'indecency'. Lacking that quality, the magazines cannot be deemed legally 'obscene' and we need not consider the question of the proper 'audience' by which their 'prurient interest' appeal should be judged."

16. What is commonly called a third test in determining whether material challenged as obscene is entitled to constitutional protection is referred to as the "social value" test. In *Roth,* re-emphasized in *Jacobellis,* the United States Supreme Court ruled that "obscenity is excluded from constitutional protection only because it is utterly [fol. 119] without social importance" and that "the portrayal of sex, e.g. in art, literature and scientific works, is not in itself sufficient reason to deny material the constitutional protection of freedom of speech and press." And the Court in the *Jacobellis* case held that

> "(I)t follows that material dealing with sex in a manner that advocates ideas . . . or that has literary or scientific or artistic value or any other form of social importance may not be branded as obscenity and denied the constitutional protection. Nor may the constitutional status of the material be made to turn on a 'weighing' of its social importance against its prurient appeal, for a work cannot be proscribed unless it is 'utterly' without social importance. See *Zeitlun* v. *Arnebergh,* 59 Cal. 2nd 901. It should also be recognized that the *Roth* standard requires in the first instance that the material 'goes substantially beyond customary limits of candor in description and representation in such matters. . . . In the absence of such a deviation from society's standards of decency, we do not see how any official inquiry into allegedly prurient appeal of a work of expression can be squared with the guaranties of the First and the Fourteenth Amendments. . . . "

The majority of the Court in *Attorney General* v. *"Tropic of Cancer",* 345 Mass. 11, 16 (cited in the support of this ruling in the *Jacobellis* case) said: "We think that in the light of the decisions reviewed above, that the First Amendment protects material which has value because of ideas, news or artistic, literary or scientific attributes."

17. The Attorney General must, therefore prove three elements or tests to maintain this petition: *First,* the "prurient interest" test, which, because of the holding in the *"Tropic of Cancer"* (345 Mass. 11) case must be shown to be "hard core pornography"; *Second,* the "patent offensiveness" test; and *Third,* the "social value" test. Failure of proof to sustain the standards that any one of these tests is designed for will result in an adjudication that the book cannot be held obscene in a constitutional sense. *Manuel Enterprises Inc.* v. *Day,* 370 U.S. 478.

[fol. 120] 18. The standards or "tests" as set forth in the preceding sections are to be applied to this book, "Memoirs of a Woman of Pleasure." The book tells of a young girl, Fanny Hill, born in a small village near Liverpool of poor parents, who died when she was fifteen years of age. She came to London seeking household work and in an employment office met the mistress of a bawdy house. These events take ten pages of the book to relate and from then on, in the remaining 210 pages,—in the words of Chief Justice Desmond in his dissenting opinion in *Larkin* v. *G. P. Putnam's Sons,* (New York Court of Appeals, decided on July 10, 1964)—the book depicts "to the last intimate physical detail numerous instances not only of prostitution, but of voyeurism, transvestism, homosexuality, Lesbianism, flogging, seduction of a boy, etc., etc." "Indeed" wrote Chief Justice Desmond, "the book is pornography in the strictest philological and etymological sense of the word since it is, quite literally, the narration by a prostitute of the particulars of her trade." "Memoirs" is essentially an uninterrupted series of minutely detailed descriptions of sexual adventures which are described by Mr. Justice Marks in *Larkin* v. *G. P. Putnam's Sons,* 213 N.Y.S. 2nd, 146, 147 "as Lesbianism, female masturbation, the deflowering of a virgin, the seduction of a male virgin, the flagellation of male by female and female by male, and aberrant acts as well as more than twenty acts of sexual intercourse between man and female, some of which are committed in the

open presence of numerous other persons and some of which are instances of voyeurism . . . and further in the book, the four girl companions of Fanny Hill who are residents in the same bawdy house are asked to narrate the circumstances of their loss of virginity which they proceed to do in lurid detail, the obvious intent being to glorify the deflowering of young girls." Having read the book four times in the preparation of this decision, I quite agree with the accuracy of the above descriptions, but there are other kinds of sexual debauchery also described such as two kinds of unnatural acts, erotic acts and orgiastic exhibitions of sexual excesses. The book intimately describes in a continuous sequence one sexual adventure after another of the types above described mortised together with short transitory passages which simply set the stages for the recital of the ensuing sex adventures. Its evident purpose is to sexually arouse its readers and keep them aroused. Of the 214 pages in the book, 42 of them—including the first ten pages telling about her life before she arrived at the bawdy house, [fol. 121] are pages not devoted to descriptions of sex adventures, but even in the 32 pages composing the transitional passages there are smutty references. This "book is pitched at the nadir of scatology" to use Chief Justice Wilkins' now famous phrase in the *"Tropic of Cancer"* case, 345 Mass. 11 at 22. Its dominant theme as a whole appeals to the prurient interest. It is pornography and "hard core" pornography at that—the kind described in section 14 of this report.

19. The *Roth* rule requires that a challenged publication to be branded obscene and denied constitutional protection, must be shown to be material which "to the average person, applying *contemporary community standards,* the dominant theme of the material taken as a whole appeals to the prurient interest." (Emphasis supplied.) As early as March 31, 1772, "Memoirs" was called a "licentious and inflaming book" than by no less a critic than James Boswell writing in his diary. In 1821, the papers in the case of *Commonwealth* v. *Holmes,* 17 Mass. 335 called the book

"Memoirs of a Woman of Pleasure" such a "lewd, wicked and obscene" publication "that the same would be offensive to the Court and improper to be placed in the court records." The intervener, the publisher, tells in the introduction of the present edition that this book is "a frankly erotic novel", first published about 1749 and "in constant, but for the most part, surreptitious, circulation ever since." And Chief Justice Desmond in his dissenting opinion in the *Larkin* v. *G. P. Putnam's Sons* case, decided on July 10, 1964, wrote that for centuries, "Memoirs of a Woman of Pleasure" (Fanny Hill) "has been cited throughout the world as the very prototype and archetype of obscenity, 'the pornographic best seller of all time' (Loth, 1961, The Erotic in Literature, p. 31). . . . " The *Roth* rule requires the determination of what judgment average persons, applying *contemporary* community standards, would make of the book, taken as a whole, insofar as appealing to the prurient interests: and the *Jacobellis* case ruled that what was meant by "contemporary community standards" were the standards of a nation and not of a particular locality, even a state. Judgment on that element can only be made on a judge's knowledge, gained from education and experience, reading decisions of courts throughout the country and accompanying case records, all the matter submitted by way of exhibits and expert testimony at the trial, and general [fol. 122] knowledge obtained from books, magazines, periodicals, viewing motion pictures and television programs and all other information media. It has been my good fortune—in addition to experience as a newspaper man and a practising attorney,—to be a judge for sixteen years, in eight of which, as a Judge of Probate, I heard hundreds of divorce and domestic relations cases involving sexual adventures of many kinds: and, as a Justice of the Superior Court, I heard in the criminal court as well as in civil cases many matters involving like adventures and obscenity. I venture to say that no better knowledge of the moral standards and the sexual practices and beliefs of ordinary people can be obtained than in the trials of sex

cases. No one can deny that since the First World War that the literature of this nation involving descriptions of sexual episodes and experiences are becoming more and more the fashion. No better evidence of this can be given than to review the avalanche of obscenity cases that have streamed into the courts in the last thirty years and the recorded dissensions between the forces striving for public decency and the purveyors of sexual filth. It is a common saying that a novel will not sell well without recitals of sexual adventures. Sex and sexual practices and perversions have been the subject of thought of all persons since the dawn of humanity and standards of sexual decency have varied from generation to generation. There can be no question that these standards throughout the country have lowered in our present lifetime and that the moral standards of the average person in relation to sexual relations are quite different and lower than in the Victorian age. The Court has not only studied the sex-concerned books, magazines and newspaper articles submitted as exhibits at the trial and in connection with the briefs counsel filed, but also has studied many other books and periodicals as well. The Court has considered the book as a whole and has considered its impact upon average persons throughout the United States and finds that it is such "hard core" pornography appealing to the prurient interests that it is not only "obscenity" as defined in *Roth* v. *United States,* 354 U.S. 476, 484 and *Attorney General* v. *"Tropic of Cancer",* 345 Mass. 11, but it is also "patently offensive" as that term is used in *Manuel Enterprises Inc.* v. *Day,* 370 U.S. 478. It goes far beyond and substantially beyond customary limits of candor and makes persistent appeals to shameful and morbid interests in prolonged, detailed and florid descriptions of sexual activities.

[fol. 123] 20. The repeated and repeated intimate and detailed portrayals of pornographic episodes are so dominant in this book that it is "utterly without redeeming social importance." (354 U.S. 489.) It is urged by the intervener that this book contains no four letter words as used in

"Tropic of Cancer" and is well written. College professors of English submitted opinions as experts as to the claimed literary or non-literary worth of the book. As has been related, opinions in book review articles and photostatic copies of newspaper articles involving opinions concerning the worth of the book in various aspects were admitted into evidence on this issue of social value. "Opinions and views of experts do reflect responsible views in the social community which any forward-looking court ought to take into account." *People* v. *Richmond County News,* 9 N.Y. 2nd at 584. And they have been taken into account. The opinions of English professors, authors and critics, however, no matter how distinguished they may be, cannot be substituted for those of average persons in the contemporary national community. Opinions of experts are admitted in evidence to aid the Court in its understanding and comprehension of the facts, but, of course, an expert cannot usurp the function of the Court. Highly artificial, stylistic writing and an abundance of metaphorical descriptions are contained in the book but the conclusions of some experts were pretty well strained in attempting to justify its claimed literary value: such as the book preached a moral that sex with love is better than sex without love, when Fanny's descriptions of her sexual acts, particularly with the young boy she seduced, in Fanny's judgment at least, was to the contrary. Careful review of all the expert testimony has been made, but, the best evidence of all, is the book itself and it plainly has no value because of ideas, news or artistic, literary or scientific attributes. *Attorney General* v. *"Tropic of Cancer"*, 345 Mass. 11 at 16. Nor does it have any other merit. "This Court will not adopt a rule of law which states obscenity is suppressible but well written obscenity is not." Mr. Justice Scileppi in *People* v. *Fritch,* 13 N.Y. 2d 119. No "weighing" of any of its alleged social importance against its prurient interest appeal is needed. "Hard core" pornography has no literary merit or social value. *Attorney General* v. *"Tropic of Cancer"*, 345 Mass. 11, 15, footnote 5. It is concluded that this book is "utterly without redeeming social importance" in the fields of art, literature,

[fol. 124] science, news or ideas of any social importance and that it is obscene, indecent and impure.

21. On July 10, 1964, this same book, "Memoirs of a Woman of Pleasure" was held by a four to three decision of the Court of Appeals of the State of New York to be entitled to the constitutional protection of the First Amendment. Vigorous dissents were filed by the Chief Justice and Mr. Justice Scileppi and the latter wrote in his dissent: "If this classic example of pornography (referring to "Memoirs") is not obscene, then I doubt if any written matter can be found obscene." I agree.

Order for Final Decree

A final decree may be entered that the book entitled "John Cleland's Memoirs of a Woman of Pleasure" commonly known as "Fanny Hill" is not entitled to the protection of the First Amendment to the United States Constitution and that the Court, finding that the said book is obscene, indecent and impure, it is adjudicated obscene, indecent and impure under the provisions of General Laws, c. 272, §§ 28C, 28E and 28F as amended by St. 1945, c. 278.

Donald M. Macaulay, Justice of the Superior Court.

Final Decree—Entered September 17, 1964

This cause came on to be further heard, and was argued by counsel; and thereupon, upon consideration thereof, it is Ordered, Adjudged and Decreed that the book named "John Cleland's Memoirs of a Woman of Pleasure", commonly known as "Fanny Hill", is obscene, indecent and impure under the provisions of G. L. c. 272, §§ 28C, 28E and 28F, as amended by St. 1945, c. 278.

[fol. 125] And it is further Ordered, Adjudged, Declared and Decreed that the above-named book is not entitled to the protection of the First and Fourteenth Amendments to the Constitution of the United States against action by the

Attorney General or other law enforcement officer pursuant to the provisions of G. L. c. 272, § 28B, or otherwise.

September 16, 1964. This decree may be entered.

Donald M. Macaulay, Justice of Superior Court.

By the Court, (Macaulay, J.),
Thomas F. Stanton, Ass't Clerk

CLAIM OF APPEAL OF INTERVENER, G. P. PUTNAM'S SONS—Filed September 18, 1964

Now comes the intervener, G. P. Putnam's Sons, and being aggrieved by the Final Decree entered herein on September 17, 1964, hereby appeals from said Decree to the Supreme Judicial Court.

By its Attorneys, Reuben Goodman, Charles Rembar.

[fol. 126]

CERTIFICATE AND ORDER OF TRIAL JUDGE AS TO EXHIBITS UNDER FULL COURT RULE 6

In the above-entitled proceedings, in which the evidence is reported, certain exhibits were introduced in evidence before me. After hearing the parties I certify, under Rule 6 of the Full Court, that the reproduction of the exhibits in the record would entail burdensome and unwarranted expense or would be impracticable.

I order that the exhibits need not be reproduced in the printed record but that they shall be preserved by the clerk of this court and that they shall be transmitted to the clerk of the Full Court of the Supreme Judicial Court, to be presented to that court at the time of argument or of submission on briefs.

Ex. A Paperback book entitled "Fanny Hill", John Cleland's Memoirs of a Woman of Pleasure

Ex. B June 21, 1963, issue of "Life Magazine"

Ex. C Photocopy of page 5, "Boston Record-American" for July 1, 1963

Ex. D Photocopies of pages 3 and 25, "Boston Record-American" for July 23, 1963

Ex. E Photocopies of pages 3 and 33, "Boston Record-American" for July 25, 1963

Ex. F Photocopies of pages 3 and 4, "Boston Record-American" for June 29, 1963

Ex. G Photocopy of page 10, "Boston Globe" for July 25, 1963

Ex. H Photocopy of page 13, "Boston Traveler" for July 23, 1963

[fol. 127] Ex. I Photocopy of page 12, "Boston Traveler" for July 23, 1963

Ex. 1 Photostatic copy of page 2, The New York Times Book Review, July 28, 1963, containing column entitled "Speaking of Books" by J. Donald Adams

Ex. 2 Article entitled "The Harlot's Progress" by V. S. Pritchett from October 31, 1963, edition of the "New York Review of Books"

Ex. 3 Article entitled "Mersey Sound 1750" by Brigid Brophy from November 15, 1963, issue of "New Statesmen"

Ex. 4 Item bearing sub-heading "Taste" under the heading "Modern Living" from August 2, 1963, issue of "Time Magazine"

The listed exhibits are all the exhibits in this case.

Donald M. Macaulay, Justice of the Superior Court.

Assented to:

Reuben Goodman, for Intervener-Appellant.

John E. Sullivan, Assistant Attorney General, for Plaintiff-Appellee.

September 22, 1964.

[fol. 129]

IN THE SUPREME JUDICIAL COURT

FOR THE COMMONWEALTH OF MASSACHUSETTS

ATTORNEY GENERAL,

vs.

A BOOK NAMED "JOHN CLELAND'S MEMOIRS OF A WOMAN OF PLEASURE."

OPINION—April 22, 1965

SPALDING, J. This is an appeal from a final decree holding the book, "John Cleland's Memoirs of a Woman of Pleasure" (Memoirs), more commonly known as "Fanny Hill," obscene, indecent and impure under G. L. c. 272, §§ 28C, 28E, and 28 F (inserted by St. 1945, c. 278, § 1).[1] The petition was brought by the Attorney General. The publisher of the book, G. P. Putnam's Sons, intervened as a party. No jury trial having been claimed under § 28D, the case was heard by a judge. The evidence consisted of the book, various newspaper articles, book reviews and the testimony of several experts in the field of literature. The

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[1] Section 28C reads, in relevant part, "Whenever there is reasonable cause to believe that a book which is being imported, sold, loaned or distributed . . . is obscene, indecent or impure, the attorney general . . . shall bring an information or petition in equity . . . directed against said book by name." Then follows a provision relating to a "reasonable cause" hearing, notice to interested persons, and an interlocutory adjudication. Section 28E provides for an adjudication against the book, in the event of default, "if the court finds that the book is obscene, indecent or impure . . . ." Section 28F provides for a contested hearing. "At such hearing the court may receive the testimony of experts and may receive evidence as to the literary, cultural or educational character of said book and as to the manner and form of its publication, advertisement, and distribution."

judge made careful and complete findings of fact and discussed the relevant law exhaustively.

[fol. 131] Memoirs was written in England in 1749. For over two centuries it has had for the most part a surreptitious circulation. Memoirs has, for example, previously been a source of litigation in this Commonwealth (see *Commonwealth* v. *Holmes,* 17 Mass. 336), and very recently it has been the subject of decisions by other courts. See *Larkin* v. *G. P. Putnam's Sons,* 14 N. Y. 2d 399; *G. P. Putnam's Sons* v. *Calissi,* 86 N. J. Super. 82.

The sole question is whether the publication of Memoirs is protected by the First Amendment to the United States Constitution, as made applicable to the States by the Fourteenth Amendment. Since a majority of the court held in *Roth* v. *United States,* 354 U. S. 476, 485, "that obscenity is not within the area of constitutionally protected speech or press," the question becomes one of determining whether or not Memoirs is obscene.

The book takes the form of two letters written by a prostitute in which she recounts her life since she, a country girl, was abandoned in London. It concentrates on her sexual experiences, both normal and abnormal, which are described in minute detail. Memoirs, as is conceded by the intervener, is erotic. Erotica and obscenity, however, are not synonymous. The fact that Memoirs may arouse sexual thoughts and desires is not, in itself, sufficient to deprive it of its constitutional protection. If the contrary were the case, the public could be deprived of many of the world's greatest literary and artistic works. Our task, then, is to trace, as best we can, the "dim and uncertain line" which separates [fol. 133] obscenity from that which is protected by the First Amendment. See *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58, 66; *Jacobellis* v. *Ohio,* 378 U. S. 184, 187. We are under no illusions as to the difficulties involved in "facing up to the tough individual problems of constitutional judgment involved in every obscenity case." *Roth* v. *United States,* 354 U. S. 476, 498.

The first Supreme Court case to face the obscenity issue squarely was *Roth* v. *United States,* 354 U. S. 476.[1] The majority opinion in that case established the following test: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." *Id.* at 489. In a footnote the majority clarified what their notion of "prurient" was by quoting with approval Am. Law. Inst., Model Penal Code, § 207.10 (2) (Tent. draft, No. 6, 1957) which defined that term as ". . . a shameful or morbid interest in nudity, sex, or excretion." [2] *Roth* v. *United States, supra,* at 487, n. 20.

We have no doubt that the dominant theme of Memoirs appeals to prurient interest. The book is composed almost [fol. 135] entirely of a series of episodes involving Lesbianism, voyeurism, prostitution, flagellation, sexual orgies, masturbation, fellatio, homosexuality, and defloration, all of which "goes substantially beyond customary limits of candor in describing or representing such matters." Am. Law Inst., Model Penal Code, § 251.4 (1) (Proposed Official Draft, May 4, 1962). See *Jacobellis* v. *Ohio,* 378 U. S. 184, 191. For the same reason, we hold Memoirs to be such an affront to current community standards as to constitute "patent offensiveness." See *Manual Enterprises, Inc.* v. *Day,* 370 U. S. 478, 482. We would reach this result whether we applied local community or national standards. See *Jacobellis* v. *Ohio, supra,* at 193 (opinion of Brennan, J.), which indicates national standards should be used. But see dissent of Warren, C.J., in that case at page 200, which takes the position that obscenity is to be defined by local community standards.

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[1] This case, as well as all but the most recent authority, is fully discussed in *Attorney Gen.* v. *"Tropic of Cancer,"* 345 Mass. 11. We need not, therefore, elaborate upon the general development of this area of the law.

[2] The same definition of "prurient" has been adopted by Am. Law. Inst., Model Penal Code, § 251.4 (1) (Proposed Official Draft, May 4, 1962).

There is one other possible test which must be considered. The majority opinion in the *Roth* case went on to say that "implicit in the history of the First Amendment is the rejection of obscenity as *utterly without redeeming social importance*" (emphasis supplied). *Id.* at p. 484. While it does not clearly emerge from the opinion whether "social importance" is an independent standard, subsequent decisions shed some light on the matter.

In *Jacobellis* v. *Ohio, supra,* 191 (opinion of Brennan, J., concurred in by Goldberg, J.), the view was expressed that the constitutional status of material cannot "be made to [fol. 137] turn on a 'weighing' of its social importance against its prurient appeal, for a work cannot be proscribed unless it is 'utterly' without social importance." See *Tralins* v. *Gerstein,* 378 U. S. 576 (per curiam), and *Grove Press, Inc.* v. *Gerstein,* 378 U. S. 577 (per curiam). Thus it would appear that unless a work is "utterly without social importance" it cannot be deemed obscene. For views which would extend the constitutional protection even further see *Roth* v. *United States,* 354 U. S. 476, 508 (dissent of Douglas, J.); *Jacobellis* v. *Ohio,* 378 U. S. 184, 196 (opinion of Black, J.); *A Quantity of Books* v. *Kansas,* 378 U. S. 205, 213 (opinion of Black, J.).

The trial judge, after an exhaustive and able discussion of the relevant decisions, ruled that the Attorney General, to maintain his petition, must meet the following three tests: *"First,* the 'prurient interest' test, which, because of the holding in the *'Tropic of Cancer'* (345 Mass. 11) case must be shown to be 'hard core pornography'; *Second,* the 'patent offensiveness' test; and *Third,* the 'social value' test." He further ruled that the "[f]ailure . . . to sustain the standards that any one of these tests is designed for will result in an adjudication that the book . . . [is not] obscene in a constitutional sense." Whether the Supreme Court of the United States has laid down three independent standards, all of which (as the judge ruled), must be satisfied, need not be decided, for in our opinion Memoirs

[fol. 139] meets all the tests.[1] As indicated above, we have little doubt that Memoirs' dominant theme appeals to prurient interests and that it is patently offensive.

It remains to consider whether the book can be said to be "utterly without social importance." We are mindful that there was expert testimony, much of which was strained, to the effect that Memoirs is a structural novel with literary merit; that the book displays a skill in characterization and a gift for comedy; that it plays a part in the history of the development of the English novel; and that it contains a moral, namely, that sex with love is superior to sex in a brothel. But the fact that the testimony may indicate this book has some minimal literary value does not mean it is of any social importance. We do not interpret the "social importance" test as requiring that a book which appeals to prurient interest and is patently offensive must be unqualifiedly worthless before it can be deemed obscene. Upon a consideration of all the evidence, including the book, we are of opinion that Memoirs is not endowed with constitutional protection.

We have not overlooked the fact that Memoirs was recently held not to be obscene in the constitutional sense by a closely divided court in *Larkin* v. *G. P. Putnam's Sons,* 14 N. Y. 2d 399. But the Superior Court of New Jersey in a well considered opinion has reached a contrary conclusion with respect to this book in *G. P. Putnam's Sons* v. *Calissi,* 86 N. J. Super. 82. We find the reasoning in that decision and the opinions of the dissenting judges in the *Larkin* case more persuasive.

It follows that the entry must be

Decree affirmed.

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[1] A fourth criterion, which involves determining whether material is hard core pornography, has been suggested. See *Jacobellis* v. *Ohio, supra,* pp. 184, 197 (opinion of Stewart, J.); *Attorney Gen.* v. *"Tropic of Cancer,"* 345 Mass. 11, 19. But the Supreme Court has never so held.

[fol. 141] WHITTEMORE, J. (dissenting, with whom Spiegel, J., joins) This book cannot be ruled to be "utterly without redeeming social importance." *Roth* v. *United States,* 354 U. S. 476, 484. *Jacobellis* v. *Ohio,* 378 U. S. 184, 191.

In the view of one or another or all of the following viz., the chairman of the English department at Williams College, a professor of English at Harvard College, an associate professor of English literature at Boston University, an associate professor of English at Massachusetts Institute of Technology, and an assistant professor of English and American literature at Brandeis University, the book is a minor "work of art" having "literary merit" and "historical value" and containing a good deal of "deliberate, calculated comedy." It is a piece of "social history of interest to anyone who is interested in fiction as a way of understanding society in the past." [1] A saving grace is that although many scenes, if translated into the present day [fol. 143] language of "the realistic, naturalistic novel, could be quite offensive" these scenes are not described in such language. The book contains no dirty words and its language "functions . . . to create a distance, even when the sexual experiences are portrayed." The response, therefore, is a literary response. The descriptions of depravity are

[1] One of the witnesses testified in part as follows: "Cleland is part of what I should call this cultural battle that is going on in the 18th century, a battle between a restricted Puritan, moralistic ethic that attempts to suppress freedom of the spirit, freedom of the flesh, and this element is competing with a freer attitude towards life, a more generous attitude towards life, a more wholesome attitude towards life, and this very attitude that is manifested in Fielding's great novel 'Tom Jones' is also evident in Cleland's novel. . . . [Richardson's] 'Pamela' is the story of a young country girl; [his] 'Clarissa' is the story of a woman trapped in a house of prostitution. Obviously, then, Cleland takes both these themes, the country girl, her initiation into life and into experience, and the story of a woman in a house of prostitution, and what he simply does is to take the situation and reverse the moral standards. Richardson believed that chastity was the most important thing in the world; Cleland and Fielding obviously did not and thought there were more important significant moral values."

not obscene because "they are subordinate to an interest which is primarily literary"; Fanny's reaction to the scenes of depravity was "anger," "disgust, horror [and], indignation." The book "belongs to the history of English literature rather than the history of smut." [2]

The book, according to its publisher, has been purchased by a considerable number of college libraries including the Harvard and Massachusetts Institute of Technology libraries.

It is not the court's function to consider whether to agree or disagree with the appraisal of the book by academic witnesses. The controlling circumstance is that the work is evaluated by representative scholars and teachers of English literature as a work of some literary and historical significance notwithstanding its patently pornographic aspects. I construe the concept embodied in the term "social importance" as used by the United States Supreme Court to include the literary and historical field. Hence, I be- [fol. 145] lieve that the publication of this book is protected by the First Amendment as expounded in the Supreme Court decisions. *Larkin* v. *G. P. Putnam's Sons,* 14 N. Y. 2d 399.

I assume that the book would be offensive to some, perhaps a great many, readers. So are numerous other books now published that use four letter words freely, portray sexual encounters explicitly and with a detail of description far beyond anything used by Cleland, and often appear intended to degrade and debase the sexual relationship. A purpose of some such books appears to be the destruction of concepts deemed basic to the existing social and moral order. If the measure intended by the *Roth* case, *supra,* were of possible effect on prevailing values, books like "Tropic of Cancer" would, I submit, be banned. But on such a scale "Fanny Hill" appears of slight, if any, weight

[2] In the opinion of the other academic witness, the headmaster of a private school, whose field is English literature, the book is without literary merit and is obscene, impure, hard core pornography, and is patently offensive.

and not worth the attention that efforts to ban inevitably bring. I agree with the opinion in the *Larkin* case, *supra,* that "[i]t is unlikely 'Fanny Hill' can have any adverse effect on the sophisticated values of our century." 14 N. Y. 2d 399, 403-404.

Freedom to read, as I construe it, means that such a book as this is to be available to those who wish to read it and that the persisting urge of others to bar its publication is effectively restrained. There is, of course, no obligation upon any member of the general public to read this book.

[fol. 147] CUTTER, J. (dissenting) I disagree with the majority opinion for reasons in part somewhat different from those stated by Mr. Justice Whittemore and Mr. Justice Spiegel.

The book seems to me offensive and unpleasant in numerous respects. In my opinion, it could reasonably be found that distribution of the book to persons under the age of eighteen would be a violation of G. L. c. 272, § 28,[1] as tending to corrupt the morals of youth. Despite the propensity of some young people to regard forbidden territory as a challenge to its exploration, it is not for the courts to determine whether it is wise to seek to prevent sale of such a book to persons under eighteen. I perceive no constitutional obstacle to treating as a criminal offence the sale of this book to persons under eighteen.[2]

---

[1] Section 28 (as amended through St. 1959, c. 492, § 1), reads in part as follows: "Whoever sells or . . . publishes for the purpose of selling or distributing, to a person under the age of eighteen years a book . . . which is obscene . . . or manifestly tends to corrupt the morals of youth . . . shall be punished by imprisonment in the state prison for not more than five years or in a jail or house of correction for not more than two and one half years, or by a fine of not . . . more than five thousand dollars, or by both such fine and imprisonment in jail or the house of correction. In order to obtain a conviction under this section, it shall not be necessary to prove that the book . . . has been adjudged to be obscene . . . under the provisions of" §§ 28C to 28H.

[2] This, as a practical matter, might cause some booksellers to refuse to sell the book to persons recognizable as minors and to

[fol. 149] It is quite another thing effectually to prohibit sale of the book to all adults in Massachusetts by declaring the book to be obscene. This proceeding presents much the same substantive question involved in *Butler* v. *Michigan*, 352 U. S. 380, 382-384. There the Supreme Court of the United States held that Michigan could not prevent the sale to adults of a book which might "have a potentially deleterious influence upon youth." Michigan then argued that it was promoting the public welfare "by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence." Mr. Justice Frankfurter wisely said of this argument, "Surely, this is to burn the house to roast the pig. . . . [The] legislation [is] not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance and progress of a free society." Here the effort is so to apply the provisions of c. 272, §§ 28C-28H, as amended (see also §§ 28, 28A, and 28B), as to deprive adults of the opportunity to read written material which, in the opinion of some members of the academic community, has some historical, literary, sociological, or entertainment interests. Although the book seems to me pretty sorry material, there is no accounting [fol. 151] for tastes. It is irrelevant that the taste of those who wish to read this tawdry writing seems deplorable to

---

be somewhat cautious about its distribution. See Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5, 84-87. Although no declaration was expressly sought that sale of the book might be a violation of § 28, a determination that the book may not be sold to certain minors is a lesser form of relief which may be reasonably regarded as included in the greater equitable relief asked for under § 28C.

judges, or to prosecutors, or to persons of conventional habits, or to volunteer guardians of the morals of other adults. Although this book appears to me to have substantially less literary excuse than the book discussed in *Attorney Gen.* v. *"Tropic of Cancer,"* 345 Mass. 11, it cannot be said to be "utterly without redeeming social importance." As I read the recent United States decisions, they declare in effect (if not in words) that to justify literary censorship there must be absent any form of worth. See *Jacobellis* v. *Ohio,* 378 U. S. 184, 191-192.

I would (a) limit the relief granted to a declaration that distribution of this book to persons under the age of eighteen may be found to constitute a violation of c. 272, § 28, if that section is reasonably applied, and (b) expressly declare that, in view of the First Amendment, the book cannot be adjudged "obscene" in the sense in which that term has been used in recent constitutional decisions of the Supreme Court of the United States.

[fol. 154] Reporter's Certificate to foregoing paper (omitted in printing).

[fol. 155]

IN THE SUPREME JUDICIAL COURT

FOR THE COMMONWEALTH OF MASSACHUSETTS

In the case of

ATTORNEY GENERAL,

vs.

A BOOK NAMED "JOHN CLELAND'S MEMOIRS OF A WOMAN OF PLEASURE."

pending in the Superior Court for the County of Suffolk.

JUDGMENT—RESCRIPT—April 22, 1965

Ordered, that the following entry be made in the docket; viz.,—

Decree affirmed.

By the Court,
Richard A. McLaughlin, Clerk.

April 22, 1965.

[fol. 156] Brief Statement of the Grounds and Reasons of the Decision:

See opinion on file.

[fol. 159]

IN THE SUPREME JUDICIAL COURT

FOR THE COMMONWEALTH OF MASSACHUSETTS

DOCKET ENTRIES

Equity No. 6543

ATTORNEY GENERAL,

vs.

A BOOK NAMED "JOHN CLELAND'S MEMOIRS OF A WOMAN OF PLEASURE."

Counsel for Plaintiff:

Attorney General, Walter J. Skinner; William I. Cowin, John E. Sullivan, Asst. Attorneys General.

Counsel for Defendant:

Widett & Kruger, Reuben Goodman, Charles Rembar.

Suffolk Superior Intervener's Appeal

Entered October 5, 1964.

December 2, 1964. Motion of Civil Liberties Union and others for leave to file brief as amici curiae.

December 3, 1964. Motion allowed by the Court.

Argued January 8, 1965.

April 22, 1965. Decree affirmed.

Rescript April 22, 1965.

Reasons as on file.

[fol. 161]

IN THE SUPERIOR COURT WITHIN AND FOR
COUNTY OF SUFFOLK, COMMONWEALTH OF MASSACHUSETTS
No. 82126 Eq.

EDWARD W. BROOKE, Attorney General,

v.

A BOOK NAMED "JOHN CLELAND'S MEMOIRS OF A WOMAN OF PLEASURE", (commonly known as Fanny Hill).

FINAL DECREE AFTER RESCRIPT—Entered June 10, 1965

This cause came on at this sitting after rescript from the Supreme Judicial Court and, pursuant to said rescript, it is Ordered, Adjudged and Decreed that the book named "John Cleland's Memoirs of a Woman of Pleasure", commonly known as "Fanny Hill", is obscene, indecent and impure under the provisions of G. L. c. 272, §§ 28C, 28E and 28F, as amended by St. 1945, c. 278.

And it is further Ordered, Adjudged, Declared and Decreed that the above-named book is not entitled to the protection of the First and Fourteenth Amendments to the [fol. 163] Constitution of the United States against action by the Attorney General or other law enforcement officer pursuant to the provisions of G. L. c. 272, § 28B, or otherwise.

By the Court, (Kalus, J.),
Thomas F. Brophey, Asst. Clerk.

Entered June 10, 1965

[fol. 167]

IN THE SUPERIOR COURT WITHIN AND FOR

COUNTY OF SUFFOLK, COMMONWEALTH OF MASSACHUSETTS

DOCKET ENTRIES

No. 82126 Eq.

EDWARD W. BROOKE, Attorney General,

vs.

A BOOK NAMED "JOHN CLELAND'S MEMOIRS OF A WOMAN OF PLEASURE" (commonly known as Fanny Hill).

Plaintiffs:

Edward W. Brooke, Attorney General.

Plaintiffs Counsel:

Pro Se, Walter J. Skinner, Asst. Atty. General, State House, Boston 33.

3/19/64—William I. Cowin, Asst. Atty. General.

5/27/64—John E. Sullivan, Asst. Atty. General.

Defendants:

A Book named "John Cleland's Memoirs of a Woman of Pleasure" (commonly known as Fanny Hill), G. P. Putnam's Sons, Intvnr.

Defendants Counsel:

Reuben Goodman—Charles Rembar,
Widett & Kruger,
80 Federal St., Boston 10.

DATE	NO.	ENTERED:
1964		
Feb. 10	1	Petition.
Feb. 10	2	Opinion of Hudson, J. that there is reasonable cause to believe that a book

DATE	NO.	ENTERED:
		named "John Cleland's Memoirs of a Woman of Pleasure" (commonly known as Fanny Hill), is obscene, indecent and impure, and order for issuance of order of notice.
Feb. 10	3	Order of notice returnable March 19, 1964. Copies issued.
Feb. 10 [fol. 169]	4	Order impounding the book "John Cleland's Memoirs of a Woman of Pleasure" (commonly known as Fanny Hill) named in the above petition and marked Exhibit A, until further order of Court.
Feb. 10	5	Plaintiff's motion for an interlocutory finding and adjudication, and allowed.
Feb. 10	6	Interlocutory findings and adjudication.
Mar. 19	7	ANSWER of G. P. Putnam's Sons, Intvnr.
Apr. 16	8	Plaintiff's motion to advance, allowed, etc.
Apr. 16	9	Order placing suit on list without jury, advanced section, for hearing May 27, 1964.
May 27	—	Trial 3rd Jury Session W. J. Macaulay, J.
May 27	10	Intervenor's request for report of evidence and designation of stenographer, and allowed.
May 27	11	Order designating Mary H. Kevill to report testimony to Supreme Judicial Court.

DATE	NO.	ENTERED:
Sept. 3	12	FINDINGS OF FACT, RULINGS OF LAW AND ORDER FOR FINAL DECREE, Macaulay, J. Notice sent.
Sept. 15	13	Transcript of Testimony. Notice sent.
Sept. 17	14	FINAL DECREE. Notice sent.
Sept. 18	15	Intervener's appeal.
Sept. 18	16	Joint designation.
Sept. 18	17	Intervener's order to Clerk for preparation of papers for Supreme Judicial Court.
Sept. 21	—	Notice sent Macaulay, J. and parties under Supreme Judicial Court Rule 2F as amended.
Sept. 22	18	Certificate of trial Judge in re: exhibits.
Sept. 22	19	Order approving joint designation, etc. Notice sent.
Sept. 22	—	Notice of estimate sent.
Sept. 23	—	Deposit for preparation of papers for Supreme Judicial Court.
[fol. 171]		
Sept. 24	—	Return receipt received re: notice of estimate.
Oct. 5	—	Notice record ready for Supreme Judicial Court sent.
Oct. 5	—	Record transmitted to Supreme Judicial Court.
1965		
Apr. 22	20	Rescript from Supreme Judicial Court, "Decree affirmed." Notice sent.
June 4	21	Plaintiff's motion for a final decree after rescript.

DATE	NO.	ENTERED:
June 10	—	Plaintiff's motion (p#21) allowed.
June 10	22	FINAL DECREE after Rescript. Notice sent.
June 15	23	Motion of G. P. Putnam's Sons, Intervenor to release all the exhibits including Exhibit A, the empounded paperback entitled "John Cleland's Memoirs of a Woman of Pleasure" for transmission to the Supreme Court of the United States as part of the record in the appeal of this case, and allowed.
June 21	24	Notice of appeal to the United States Supreme Court by G. P. Putnam's Sons, Intervenor.
June 23	—	Record Prepared and sent to United States Supreme Court.

Thomas Forgan, Clerk.

[fol. 173]

IN THE SUPERIOR COURT WITHIN AND FOR
COUNTY OF SUFFOLK, COMMONWEALTH OF MASSACHUSETTS

No. 82126 Eq.

EDWARD W. BROOKE, Attorney General,

vs.

A Book Named "JOHN CLELAND'S MEMOIRS OF A WOMAN OF PLEASURE" (Commonly Known as FANNY HILL).

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES BY G. P. PUTNAM'S SONS, INTERVENOR—
Filed June 21, 1965

I. Notice is hereby given that G. P. Putnam's Sons, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment (Rescript) of the Supreme Judicial Court for the Commonwealth of Massachusetts entered on April 22, 1965, affirming the Final Decree of the Superior Court for the County of Suffolk in this cause, and from the Final Decree after Rescript entered by said Superior Court pursuant thereto on June 10, 1965.

This appeal is taken pursuant to 28 U. S. C. Section 1257(2).

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

A. The entire printed record on appeal to the Supreme Judicial Court;

[fol. 175] B. The exhibits listed in said record (R-126/7); viz:

1. Ex. A Paperback book entitled "John Cleland's Memoirs of a Woman of Pleasure"

2. Ex. B June 21, 1963, issue of "Life Magazine"
3. Ex. C Photocopy of page 5, "Boston Record-American" for July 1, 1963
4. Ex. D Photocopies of pages 3 and 25, "Boston Record-American" for July 23, 1963
5. Ex. E Photocopies of pages 3 and 33, "Boston Record-American" for July 25, 1963
6. Ex. F Photocopies of pages 3 and 4, "Boston Record-American" for June 29, 1963
7. Ex. G Photocopy of page 10, "Boston Globe" for July 25, 1963
8. Ex. H Photocopy of page 13, "Boston Traveler" for July 23, 1963
9. Ex. I Photocopy of page 12, "Boston Traveler" for July 23, 1963
10. Ex. 1 Photostatic copy of page 2, The New York Times Book Review, July 28, 1963, containing column entitled "Speaking of Books" by J. Donald Adams
11. Ex. 2 Article entitled "The Harlot's Progress" by V. S. Pritchett from October 31, 1963, edition of the "New York Review of Books"
12. Ex. 3 Article entitled "Mersey Sound 1750" by Brigid Brophy from November 15, 1963, issue of "New Statesman"

[fol. 177] 13. Ex. 4 Item bearing sub-heading "Taste" under the heading "Modern Living" from August 2, 1963, issue of "Time Magazine";

C. The majority and dissenting opinions of the Supreme Judicial Court;

D. The Rescript of the Supreme Judicial Court;

E. The docket entries of the Supreme Judicial Court;

F. The Final Decree after Rescript;

G. The Notice of Appeal to the Supreme Court of the United States;

H. Docket entries of the Superior Court for the County of Suffolk; and

I. The Certificate of the Clerk of the Superior Court for the County of Suffolk.

III. The following question is presented by this appeal:

Whether Section 28C-H of Chapter 272 of the General Laws of Massachusetts, as applied to the book named "John Cleland's Memoirs of a Woman of Pleasure", are unconstitutional under the First Amendment of the United States Constitution as made applicable to the states by the Fourteenth Amendment of the United States Constitution.

Together with the following subsidiary questions, which are, among others, comprised within the foregoing general question:

(1) Whether the publication of a book is protected by the First and Fourteenth Amendments if it is not utterly without social importance within the meaning of *Roth* v. *United States* and *Alberts* v. *California*, 354 U.S. 476, and whether "John Cleland's Memoirs [fol. 179] of a Woman of Pleasure" is such a book.

(2) Whether the publication of a book is protected by the first and Fourteenth Amendments if it does not appeal predominantly to prurient interest within the meaning of *Roth* v. *United States* and *Alberts* v. *California*, 354 U.S. 476, and whether "John Cleland's Memoirs of a Woman of Pleasure", is such a book.

(3) Whether the publication of a book is protected by the First and Fourteenth Amendments if it is not patently offensive within the meaning of *Manual Enterprises, Inc.* v. *Day,* 370 U.S. 478, and whether "John Cleland's Memoirs of a Woman of Pleasure", is such a book.

By its Attorneys, Reuben Goodman, Charles Rembar.

Acknowledgment of Service and Stipulation

Edward W. Brooke, Attorney General, appellee herein, acknowledges service of the foregoing Notice of Appeal and [fol. 181] stipulates to the designation of the record as set out in Paragraph II thereof, waiving any rights to cross-designate.

Edward W. Brooke, Attorney General, By: William I. Cowin, Assistant Attorney General.

Dated: June 21, 1965

[fol. 184] [File endorsement omitted]

[fol. 185] Judge's certificate and Clerk's certificate thereto (omitted in printing).

[fol. 187] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 188]

SUPREME COURT OF THE UNITED STATES

No. 368, October Term, 1965

A BOOK NAMED "JOHN CLELAND'S MEMOIRS OF A WOMAN OF PLEASURE", G. P. PUTNAM'S SONS (INTERVENOR), Appellant,

v.

ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS.

APPEAL from the Supreme Judicial Court of the Commonwealth of Massachusetts.

ORDER NOTING PROBABLE JURISDICTION—
November 8, 1965

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

FILE COPY

Office-Supreme Court,
FILED
JUL 19 1965
JOHN F. DAVIS, CLE

Supreme Court of the United States.

OCTOBER TERM, 1965.

No. 368

A BOOK NAMED "JOHN CLELAND'S MEMOIRS OF A WOMAN OF PLEASURE",
G. P. PUTNAM'S SONS (INTERVENOR), *Appellant*,

v.

ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, *Appellee*.

JURISDICTIONAL STATEMENT.

CHARLES REMBAR,
REMBAR AND ZOLOTAR,
521 Fifth Avenue,
New York 17, N.Y.

ADDISON C. GETCHELL & SON, INC., LAW PRINTERS, BOSTON.

Table of Contents.

Opinion below	1
Jurisdiction	2
Statutes involved	3
Questions presented	3
Statement of case	4
1. The proceedings and the presentation of the federal questions	4
2. The facts	6
The appropriateness of review	9
1. The case presents a matter of considerable cultural significance	9
2. There is a multiplicity of litigation that itself impairs first amendment rights and that can only be terminated by a decision of this Court	12
The questions are substantial	14
1. The tests are independent	14
2. Memoirs is entitled to constitutional protection under the prurient interest test	16
3. Memoirs is entitled to constitutional protection under the patent offensiveness test	22
4. Memoirs is entitled to constitutional protection under the social value test	24
5. The hard-core pornography test leads to the same result	32
Conclusion	33
Appendix	34
Rescript of Supreme Judicial Court	34
Final decree after rescript	35
Opinion of Supreme Judicial Court	36
Statutory appendix	46
Massachusetts General Laws	
Chapter 272	46
Chapter 231A	49

Table of Authorities Cited.

CASES.

Alberts v. California, 354 U.S. 476 2, 3, 11, 14, 16, 19, 24, 28

A Quantity of Books v. Kansas, 378 U.S. 205 11, 33

Attorney General v. A Book Named "John Cleland's Memoirs of a Woman of Pleasure", 1965 Mass. Adv. Sh. 635 1

Attorney General v. Book Named "Tropic of Cancer," 345 Mass. 11, 184 N.E. 2d 328 15

Breard v. Alexandria, 341 U.S. 622 25n.

Burke v. Kingsley Books, Inc., 208 Misc. 150, 142 N.Y.S. 2d 735, aff'd sub nom., Kingsley Books, Inc., v. Brown, 354 U.S. 436 32

City of Chicago v. Kimmel, 31 Ill. 2d 202, 201 N.E. 2d 386 15

Cole v. Violette, 319 U.S. 581 2n.

Commonwealth v. Moniz, 338 Mass. 442 4n.

Cox v. New Hampshire, 312 U.S. 569 25n.

Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 2

Dombrowski v. Pfister, 85 S. Ct. 1116 14

Doubleday & Co., Inc., v. New York, 335 U.S. 848 11

Haiman v. Illinois, Sup. Ct. of Illinois, 1964, Docket No. 37276 15

G. P. Putnam's Sons v. Calissi, 86 N.J. Super. 82, 205 A. 2d 913 12

Grove Press, Inc., v. Christenberry, 175 F. Supp. 488; aff'd 275 F. 2d 433 11

Grove Press, Inc., v. Gerstein, 378 U.S. 577 3, 11, 12n., 15, 28, 33

Jacobellis v. Ohio, 378 U.S. 184 3, 9, 15, 28

Kingsley Books, Inc., v. Brown, 354 U.S. 436 12

Kovacs v. Cooper, 336 U.S. 77 25n.

Labor Board v. Virginia Electric & Power Co., 314 U.S. 469 25n.

Larkin v. G. P. Putnam's Sons, 14 N.Y. 2d 399, 200 N.E. 2d 760 12, 15

Manual Enterprises, Inc., v. Day, 370 U.S. 478 2, 4, 11, 14, 22, 24

McCauley v. Tropic of Cancer, 20 Wis. 2d 133, 121 N.W. 2d 545 15

New York Times Co. v. Sullivan, 376 U.S. 254 14

People v. Bruce, 31 Ill. 2d 459, 202 N.E. 2d 497 15

People v. Finkelstein, 11 N.Y. 2d 300, 183 N.E. 2d 661, cert. den. 371 U.S. 863 32

People v. Fritch, 13 N.Y. 2d 119, 192 N.E. 2d 713 15, 29n.

People v. Richmond County News, Inc., 9 N.Y. 2d 578, 175 N.E. 2d 681 33

People v. Sikora, 204 N.E. 2d 768 32

Prince v. Massachusetts, 321 U.S. 158 25n.

Queen v. S. Coles Co. Ltd., 44 Crim. Rep. 219 18

Roth v. United States, 354 U.S. 476 2, 3, 11, 14, 16, 19, 22, 24, 25, 25n., 28

Schenck v. United States, 249 U.S. 47 25n.

Teamsters Union v. Hanke, 339 U.S. 470 25n.

United States v. Harriss, 347 U.S. 612 25n.

United States v. One Book Called "Ulysses," 5 F. Supp. 182; aff'd 72 F. 2d 705 11

Zeitlin v. Arnebergh, 59 Cal. 2d 901, 383 P. 2d 152, cert. den. 375 U.S. 957 15

STATUTES, &C.

Florida Constitution 11n.

G.L. c. 231A 5
G.L. c. 272, § 28B 4n.
G.L. c. 272, §§ 28C-28H 2, 3, 4

New York Criminal Code, Art. 22-a 12

28 U.S.C. § 1257(2) 2

U.S. Constitution, First Amendment 2, 3, 4, 5, 6
U.S. Constitution, Fourteenth Amendment 5

TEXTBOOKS, &C.

A.L.I. Model Penal Code, Tentative Draft No. 6, p. 10 17

Supreme Court of the United States.

OCTOBER TERM, 1965.

No.

A BOOK NAMED "JOHN CLELAND'S MEMOIRS OF A WOMAN OF PLEASURE",
G. P. PUTNAM'S SONS (INTERVENOR), *Appellant*,

v.

ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, *Appellee*.

JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts entered April 22, 1965, and from a final decree after rescript of the Superior Court of the Commonwealth of Massachusetts entered pursuant thereto. Appellants submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal constitutional questions are presented.

Opinion Below.

The opinion of the Supreme Judicial Court is reported at 1965 Mass. Adv. Sh. 635. It is set forth at pages 36 to 41 of the Appendix.

Jurisdiction.

The proceeding that gives rise to this appeal was brought pursuant to chapter 272 of the General Laws of Massachusetts, §§ 28C-28H. Invoking these statutory provisions, the Attorney General filed a petition seeking interlocutory and final adjudication that the book entitled "John Cleland's Memoirs of a Woman of Pleasure" published by G. P. Putnam's Sons (hereinafter called "*Memoirs*") is obscene, indecent and impure (R. 1-2). Pursuant to statutory provision, G. P. Putnam's Sons intervened. (The Attorney General will be referred to as "the Attorney General" and the intervening publisher as "the Publisher".) The Publisher interposed defenses based solely on the First Amendment. The Superior Court rejected the Publisher's constitutional contentions, declared the book not entitled to the protection of the First Amendment, and adjudged it obscene (R. 124-125). The Supreme Judicial Court affirmed. Its judgment was entered April 22, 1965, and notice of appeal was filed on June 21, 1965. The appeal is taken from the judgment of the Supreme Judicial Court and from the decree entered thereon by the Superior Court.*

The statutory provision believed to confer jurisdiction of the appeal upon this Court is 28 U.S.C. § 1257(2).

The cases believed to sustain the jurisdiction of this Court are *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282; *Roth* v. *United States* and *Alberts* v. *California*, 354 U.S. 476; *Manual Enterprises, Inc.*, v. *Day*, 370 U.S.

*The Supreme Judicial Court is not a court of record, the record in this case being in the Superior Court. Although the judgment of the Supreme Judicial Court is final for purposes of appeal to this Court (*Cole* v. *Violette*, 319 U.S. 581), it is the Massachusetts practice to enter a further final decree upon the rescript of the Supreme Judicial Court, and, to avoid any question, this appeal is taken from both.

478; *Grove Press, Inc.*, v. *Gerstein*, 378 U.S. 577; and *Jacobellis* v. *Ohio*, 378 U.S. 184.

Statutes Involved.

The statutes involved are §§ 28C-28H of chapter 272 of the General Laws of Massachusetts. They are set forth in the Appendix at pages 47 to 49.

Questions Presented.

The basic question on appeal is:

> Whether §§ 28C-28H of chapter 272 of the General Laws of Massachusetts, as applied to the book named "John Cleland's Memoirs of a Woman of Pleasure," are unconstitutional under the First Amendment of the United States Constitution as made applicable to the states by the Fourteenth Amendment of the United States Constitution.

Within the foregoing basic question there are comprised, among others, the following subsidiary questions:

(*a*) Whether the publication of a book is protected by the First Amendment if it is not utterly without social importance within the meaning of *Roth* v. *United States* and *Alberts* v. *California*, 354 U.S. 476, and whether "John Cleland's Memoirs of a Woman of Pleasure" is such a book.

(*b*) Whether the publication of a book is protected by the First Amendment if it does not appeal predominantly to prurient interest within the meaning of *Roth* v. *United States* and *Alberts* v. *California*,

354 U.S. 476, and whether "John Cleland's Memoirs of a Woman of Pleasure" is such a book.

(*c*) Whether the publication of a book is protected by the First Amendment if it is not patently offensive within the meaning of *Manual Enterprises, Inc.*, v. *Day*, 370 U.S. 478, and whether "John Cleland's Memoirs of a Woman of Pleasure" is such a book.

Statement of Case.

1. The Proceedings and the Presentation of the Federal Questions.

Sections 28C-28H establish a proceeding by which it may be adjudicated that a book is obscene, indecent and impure.* The consequence of such an adjudication, under the law of Massachusetts, is the suppression of the book.† The Attorney General's petition sought such an adjudication (R. 2). The Publisher answered by setting up defenses based on the United States Constitution, and made no other defense.

The answer (1) denied that the book is obscene; (2) alleged that the sale and distribution of the book are pro-

*The second and third statutory adjectives will hereinafter be treated as subsumed in the term "obscene". See *Commonwealth* v. *Moniz*, 338 Mass. 442.

† Section 28B of chapter 272 (the section immediately preceding those under which the proceeding was brought) provides imprisonment and fine for "Whoever . . . publishes . . . or distributes . . . a book, knowing it to be obscene . . . ." Section 28H provides that, if a proceeding such as the present one results in an adjudication that the book is obscene, then in any trial under § 28B the defendant "shall be conclusively presumed to have known said book to be obscene." Thus the question whether the book is obscene, as well as the question of scienter, can be litigated only in this proceeding and not in any subsequent criminal prosecution.

tected by the First Amendment of the United States Constitution as applied to the states by the Fourteenth Amendment; (3) alleged that, if the application of the Massachusetts statute results in an adjudication that the book is obscene, the statute as applied is unconstitutional under the First and Fourteenth Amendments; (4) alleged that an adjudication whose effect is to impede or prevent the sale or distribution of the book would be an unconstitutional deprivation of rights guaranteed by the First and Fourteenth Amendments. The Publisher prayed that the court adjudicate the book not obscene, and enter a decree, pursuant to the declaratory judgment statute of Massachusetts (G.L. c. 231A), making a declaration of the points alleged by way of defense (R. 6-8).

The constitutional questions were again presented in the Publisher's trial briefs and orally by the Publisher's counsel at the trial (R. 103-107). It was emphasized that the Publisher's denial of the allegation of obsceneness was based solely on the ground that the book is constitutionally protected expression (R. 103). On appeal to the Supreme Judicial Court the brief for the Publisher posed the issue as follows:

> "The Issue.
>
> "This case involves a single issue: Is the publication of *John Cleland's Memoirs of a Woman of Pleasure* protected by the guaranties of the First Amendment of the United States Constitution?
>
> "The Intervenor concedes that the pertinent Massachusetts statutes have as complete an effect as the First Amendment permits them to have—that the legislation covers all material obscene in the constitutional sense. The Intervenor takes no position as to the proper construction of the statutes apart from the limitations on such construction that are imposed by

the First Amendment. *The Intervenor contends, however, that, if the statutes are construed to penalize the publication of this book or to sanction its suppression, the statutes as so applied are unconstitutional.* [Italics added.]

"The issue of constitutionality tendered by the Intervenor relates solely to the Federal Constitution. It involves the First Amendment as made applicable to state statutes and state action by the Fourteenth Amendment. We believe that the protection afforded by the First Amendment is at least as broad as that afforded by the Constitution of the Commonwealth of Massachusetts, but, if the state constitutional guaranty be thought to be any broader than the federal, the Intervenor waives the additional protection."

The Supreme Judicial Court dealt with the appeal, in accordance with the issue thus presented, as involving only a question under the First Amendment. The majority were "of opinion that Memoirs is not endowed with constitutional protection" (App. p. 40) and ordered the decree affirmed. The rescript of the Supreme Judicial Court incorporated the opinion.

2. The Facts.

At the trial a copy of the book was introduced by stipulation, and the Attorney General called one witness. The Publisher called several witnesses and introduced documentary evidence.

The following witnesses testified to the literary merit, historical importance and other values of the book: Fred Holly Stocking, Professor of English and Chairman of English Department, Williams College; John N. Bullitt,

Professor of English and Master of Quincy House, Harvard College; Robert H. Sproat, Associate Professor of English Literature, Boston University; Norman N. Holland, Associate Professor of English, Massachusetts Institute of Technology; and Ira Konigsberg, Assistant Professor of English and American Literature, Brandeis University. The Attorney General's witness was Dr. John E. Collins, Headmaster of the Newman Preparatory School.

The Publisher's witnesses were all highly qualified (R. 45-46, 59, 69-70, 77, 93). Their qualifications were not equalled by those of the one witness for the Attorney General (R. 20).

The Publisher also introduced documentary evidence. On the matter of literary merit, there are essays by the critics J. Donald Adams, V. S. Pritchett and Brigid Brophy, in *The New York Sunday Times Book Review,* the *New York Review of Books* and the *New Statesman* respectively, and an article in *Time* magazine (R. 31-43). On the matter of community standards, there are newspaper clippings and a copy of *Life* magazine.

The volume in question contains the Cleland novel, an introduction by Peter Quennell and a historical note by the publisher. For over two centuries Cleland's work has had a wide, though for the most part surreptitious, circulation (Ex. A, Introduction and Note). In 1963 it was finally given open publication by G. P. Putnam's Sons, a company that has engaged in a century and a quarter of distinguished publishing (R. 90-91). The distribution of the book in no way departed from the normal course of Putnam's distribution; its only unusual feature was the relatively large number of orders from universities and libraries (R. 91).*

*The Library of Congress requested the right to translate the book into Braille (R. 91).

Memoirs is one of a group of works important in the development of the English novel. A single decade—the 1740's—saw the publication of Richardson's *Pamela* and *Clarissa,* Cleland's *Memoirs* and Fielding's *Tom Jones.* The works of that decade may be said to have developed the English novel in the modern sense, and *Memoirs* is very much part of the process (R. 93-95).

Memoirs is, of course, an erotic novel. It is at the same time a work of art—careful and gifted writing that succeeds as a novel. Read as a whole, it creates an effect that is primarily literary (R. 46, 53-54, 58, 60, 70, 79, 93-94). The style is excellent (R. 46, 79, 96), but the literary merits of the book go considerably beyond the stylistic. It is artistically structured fiction that contains a "plot with a purpose" (R. 47, 61, 65, 70, 80). It is a "novel of education", that is, a novel in which the principal character learns from experience and develops and changes (R. 61). She participates in the experiences that she narrates and then reflects and generalizes upon them (R. 46-47, 49, 50, 73). This reflection results in her acceptance and advocacy of certain values and ideas—the worth of pleasure and the place of pleasure; prudence, moderation and a rational view of the world; and finally an affirmation of the superiority of sex-in-love to the merely lustful (R. 32, 40, 46-47, 61, 65, 70, 71-76, 96, 101). Cleland displays the high literary talent of imaginative projection (R. 47). There is skill in characterization (R. 62-63) and a gift for comedy (R. 61-62). The book shows acute psychological insight (R. 80-81). Apart from its intrinsic merits, the novel has historical value both because of the part it plays in the history of English literature (R. 60, 62, 78, 93-96) and because of the information it gives concerning the period (R. 33, 38-39, 47, 59, 62, 78, 93-94).

The witnesses, as both critics and general readers inevitably do, differed among themselves in their appraisals

of the book. But they all (except Dr. Collins) agreed that *Memoirs* is a work of considerable value.

The Appropriateness of Review.

By the decisions of the courts below, a book is suppressed. The suppression is effected over the contention that the book constitutes expression protected by the First Amendment. "Such an issue . . . must ultimately be decided by this Court." *Jacobellis* v. *Ohio,* 378 U.S. 184, 188. Disposition by this Court is particularly appropriate in the present case.

1. THE CASE PRESENTS A MATTER OF CONSIDERABLE CULTURAL SIGNIFICANCE.

It has, of course, been held that the guaranties of freedom of speech and of the press go beyond vocal utterance and the printed word. It does not follow, however, that the guaranties are to be applied in the same way, or to the same extent, with respect to all forms of expression. See *Freedman* v. *Maryland,* 380 U.S. 51. Books have a certain primacy because of their importance to society. Moreover, such conflicts as there may be with interests sought to be served by anti-obscenity legislation are less intense where books are concerned.

The audience for a book is the individual reader, not an assembled group. In a theatre audience, for example, there is a simultaneously shared experience, and the social interaction itself creates difficulties.* Again, the reader of a book has instant control over his exposure to it; he can terminate the experience by closing the book, and if its repu-

*The familiar hypothetical from another area of restraint—shouting "Fire!" in a theatre—would hardly present a problem if there were only one other person in the theatre.

tation puts him off, he need not open it. In contrast, other means of communication—the sound truck, for example, or the advertising poster in a train or bus—make us their captive. Television, the great new medium of our time, presents both aspects: its communications are received in a social situation, and continued exposure is not always easily terminated. Typically, television-viewing is a family affair, and it takes a family consensus to end it. Finally, media of expression differ in their impact. Scenes described in commonly accepted books would, if performed by actors on a stage, or displayed in photographs on a billboard, become quite different in their effect. There is no means of general communication that is more private, more intellectual and less involved with public decorum than a book.

Hence the possibilities of antagonism between the publishing of books and other interests of society are relatively small. At the same time, books have a singular importance for society. Tradition gives them a special place. It was to liberty of printing that John Milton's *Areopagitica* was addressed, and the great controversies about freedom of expression that were resolved in the adoption of the First Amendment had to do mainly with books (including that predecessor of contemporary paperbacks, the pamphlet).

Books provide a vehicle for the transmission of thought that is not matched by other forms of expression. They communicate ideas not alone by way of exposition, but also through the shared experiences and perceptions of poetry and fiction. Other forms of expression may be as good or better for entertainment, excitement or the arousing of emotion, but the printed word remains our most important medium for the dissemination of ideas.

Although the Court has several times spoken on the subject of the relationship between the First Amendment and anti-obscenity legislation, it has had little occasion to do so

in connection with books. The *Roth* and *Alberts* decisions (354 U.S. 476) did not at all involve the particular material that occasioned the prosecutions. The publications that were considered (by some members of the Court) in *Manual Enterprises, Inc.*, v. *Day*, 370 U.S. 478, and in *A Quantity of Books* v. *Kansas*, 378 U.S. 205, were not of a character to provide helpful analogies for serious writers and reputable publishers. The cases concerning *Ulysses* (72 F. 2d 705, affirming 5 F. Supp. 182) and *Lady Chatterley's Lover* (*Grove Press, Inc.*, v. *Christenberry*, 276 F. 2d 433, affirming 175 F. Supp. 488) were concluded (by judgments in favor of publication) before reaching this Court. The case concerning Edmund Wilson's *Memoirs of Hecate County* was decided (against publication) without opinion, and by an evenly divided Court (*Doubleday & Co., Inc.*, v. *New York*, 335 U.S. 848). *Tropic of Cancer* is the only work as to which the claim of literary value has been made and on which there have been opinions of this Court (*Grove Press, Inc.*, v. *Gerstein*, 378 U.S. 577). Even there the five members of the Court who dealt with the book referred to reasons stated in another case that did not involve a book. Four Justices were of the opinion that certiorari should be denied and did not participate in the consideration of the merits, presumably on the ground that constitutional questions had not been preserved.* These circumstances perhaps account for the fact that there is incomplete understanding of the meaning and effect of the *Tropic* decision.†

*The inference is based on the fact that the petition for certiorari had been opposed on this ground, the respondent arguing that the petitioner had waived the constitutional questions, and that only the Supreme Court of Florida—and not the intermediate appellate court whose judgment was sought to be reviewed—had jurisdiction to hear appeals involving the validity of a statute or construing the United States or Florida Constitutions (respondent's brief in opposition to petition for writ of certiorari, pp. 2-4).

† Public misapprehensions are illustrated in an issue of "Decency Reporter", the publication of the Citizens For Decent Litera-

In view of the importance of books, and the paucity of direct statement on the protection afforded books by the first amendment, what this Court will have to say with respect to *Memoirs* is eagerly awaited as a guide to what may be written and what may be published.

2. THERE IS A MULTIPLICITY OF LITIGATION THAT ITSELF IMPAIRS FIRST AMENDMENT RIGHTS AND THAT CAN BE ENDED BY A DECISION OF THIS COURT.

The basic issue on appeal—whether *Memoirs* may be suppressed—is in litigation or has been litigated in four states: New York, Massachusetts, New Jersey and Illinois. In Illinois a bookseller has been convicted in a criminal prosecution; counsel for the defendant have stated that an appeal is planned. In New Jersey, in an action brought under a New Jersey statute similar to Article 22-a of the New York Code of Criminal Procedure (the statute involved in *Kingsley Books, Inc.*, v. *Brown,* 354 U.S. 436), there has been a decision after trial holding that the book is obscene and not entitled to constitutional protection (*G. P. Putnam's Sons* v. *Calissi,* 86 N.J. Super. 82, 205 A. 2d 913); notice of appeal has been filed, and the appellate court has stayed the matter pending the determination of the instant appeal. In New York, in an action brought under Article 22-a, the trial court has held the book entitled to constitutional protection, the Appellate Division has reversed by a vote of three to two, and the Court of Appeals has reversed the Appellate Division by a vote of four to three (*Larkin* v. *G. P. Putnam's Sons,*

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ture (vol. 2, No. 35, October 29, 1964). It refers to the action of this Court in *Grove Press* v. *Gerstein* as "a 5-4 decision," and criticizes the Illinois Supreme Court for following *Grove Press* v. *Gerstein* and ignoring "the two other cases that the U. S. Supreme Court upheld."

14 N.Y. 2d 399, 200 N.E. 2d 760). In the present case the Supreme Judicial Court also has divided four to three, the publication being suppressed in Massachusetts by the same margin as that by which it was sustained in New York. Thus, of the fourteen high state court judges who have ruled on the book, seven have construed the decisions of this Court to sanction its suppression and seven have construed those decisions to accord the book the protection of the First Amendment. (It may be noted that the Supreme Judicial Court and the Court of Appeals have also rendered four-to-three decisions on *Tropic of Cancer*, the positions being exchanged; the Massachusetts majority found the Miller book entitled to the constitutional protection that the New York majority denied it.)

Multiplicity of litigation is itself a powerful form of extra-judicial censorship. It is extra-judicial because, although it invokes judicial processes, its effectiveness depends not on ultimate judicial decision, but on the financial strain that the litigation puts upon the publisher. A publisher enmeshed in litigation in a number of jurisdictions —either directly or through the indemnities to booksellers that prevail in the book trade—soon finds himself facing legal expenses that make publication of the book unprofitable, and may even jeopardize his economic existence.* The inhibiting effects on publishing, and consequently on intellectual and artistic creativity, are plain. There are indications that this method of censorship has been adopted in some localities as a matter of deliberate policy, even where it is expected that the publication of the book will ultimately be sustained in the courts.†

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*See Lewis, "The Most Recent Troubles of 'Tropic': A Chapter in Censorship", *New York Times Sunday Book Review*, January 21, 1962, p. 4.

†See, for example, *Chicago Daily News*, December 2, 1964, p. 6, cols. 6-8, in reporting on certain pending obscenity prosecutions:

A "chilling effect upon the exercise of First Amendment rights" may come from the threat of prosecution (*Dombrowski* v. *Pfister*, 85 S. Ct. 1116, 1121) or from the imposition of financial burden (*New York Times Co.* v. *Sullivan*, 376 U.S. 254). A multiplicity of litigation against a book has both effects: it imposes an extraordinary financial burden on the publisher, and it simultaneously threatens criminal prosecution to booksellers in every state whose highest court has not yet passed upon the book. Since the protection of the First Amendment is asserted as a defense in all the cases involving *Memoirs*, a decision by this Court can forestall the consequences that would otherwise flow from the mass of litigation. Indeed, only a decision by this Court can assure that the right to publish, if it exists in law, also exists in fact.

The Questions are Substantial.

1. THE TESTS ARE INDEPENDENT.

In *Roth* and *Alberts* this Court formulated two independent tests by which it can be determined whether a book, challenged as obscene, is entitled to the protection of the First Amendment. One has come to be called the "prurient interest" test, the other the "social value" test. In *Manual*

"Assistant State's Atty. Daniel J. Leahy said: 'We're well aware of the decisions lately of the supreme courts. We do not agree with them as a whole or any part of them'."

and *The Hollywood Reporter*, March 24, 1965:

"Rep. Dowdy advocated getting local authorities to prosecute sellers of nudie magazines and other offensive publications and exhibitors of films they believe obscene, even if it is known that under Supreme Court interpretations of law no convictions can be gained. Dowdy said in this way exhibitors and others would simply give up because the receipts would be less than the expense."

Enterprises, Inc., v. *Day*, 370 U.S. 478, a third test, that of "patent offensiveness", was set forth.

The prurient interest test and the patent offensiveness test supply the outer boundaries of the general field to which anti-obscenity legislation relates. But within this general field another test is to be applied: the legislation can have a constitutional application only if the challenged publication is without value. Thus a book found to have intellectual content or artistic merit or some other form of social importance may not be suppressed, regardless of what conclusion might be reached if the prurient interest test were applied by itself and without regard to social value.

It is the Publisher's position that a book must fail by all of these tests before it may be suppressed. If, in applying any one of them, the result is on the side of free expression, suppression is impermissible. The weight of state court authority supported this position even before *Jacobellis* v. *Ohio*, 378 U.S. 184, and *Grove Press, Inc.*, v. *Gerstein*, 378 U.S. 577, were decided. See *Attorney General* v. *Book Named "Tropic of Cancer,"* 345 Mass. 11, 184 N.E. 2d 328; *Zeitlin* v. *Arnebergh*, 59 Cal. 2d 901, 383 P. 2d 152, cert. den. 375 U.S. 957; *McCauley* v. *Tropic of Cancer*, 20 Wis. 2d 134, 121 N.W. 2d 545; but *cf. Haiman* v. *Illinois*, Sup. Ct. of Illinois, 1964, Docket No. 37276 (not reported and withdrawn by order dated July 7, 1964), and *People* v. *Fritch*, 13 N.Y. 2d 119, 192 N.E. 2d 713. After *Jacobellis* and *Grove Press* the high state courts that had earlier rejected the view now accepted it. *City of Chicago* v. *Kimmel*, 31 Ill. 2d 202, 201 N.E. 2d 386; *People* v. *Bruce*, 31 Ill. 2d 459, 202 N.E. 2d 497; *Larkin* v. *G. P. Putnam's Sons*, 14 N.Y. 2d 399, 200 N.E. 2d 760.

In the decision from which the present appeal is taken, the majority, although indicating acceptance of the view (App. p. 40), stated that whether there were three inde-

pendent standards "need not be decided, for in our opinion Memoirs meets all the tests" (App. p. 40).

We submit that the tests are independent. If the proposition is not involved here, it is only because, with all due respect to the majority below, its opinion was wrong at every point; *Memoirs* is a book that under each of the tests must be found to come within the protection of the First Amendment.

2. Memoirs is entitled to constitutional protection under the prurient interest test.

When this Court, in *Roth* and *Alberts,* formulated the prurient interest test, it was not engaged in the simple exercise of synonym-swapping. Most earlier efforts to give meaning to the term "obscene" had ended by doing no more than replacing one epithet with another. "Obscene" was defined as "lewd", "lewd" as "lascivious", "lascivious" as "libidinous", "libidinous" as "licentious" and "licentious" as "lustful". "Immoral", "improper" and "impure" were tried, along with "indecent", "filthy" and "vulgar". The succeeding definitions had different trim, but no functional change, and the troublesome vagueness persisted.

In the last decade, however, courts began to consider the matter in a constitutional context, and in that context this Court, with *Roth* and *Alberts,* dispelled a good deal of the vagueness. The Court chose a word that had not been prominent in earlier formulas—the word "prurient". It was a word whose peculiar connotations set it apart from its predecessors. The choice, of course, was not mere rhetoric. The purpose, we suggest, was to make it clear that the *Hicklin* test and its derivatives were no longer the law, and to define more narrowly and with greater depth

the characteristic that must be found in the material upon which anti-obscenity statutes may operate.

The fact that a publication may appeal to the sexual interest of the reader, or may create a sexual response in him—the fact that the publication may be called erotic, or, in terms of the older definitions, lustful—would not satisfy the new and narrower prurient interest test. The etymological source of "prurient" is a word that means "itching", and its present-day connotations are "dirty", "nasty", "furtive", "unwholesome". In the American Law Institute definitions quoted and approved by the Court, "prurient interest" is "a shameful or morbid interest in nudity, sex, or excretion". This leaves no room for the proposition that a writing may be suppressed merely because it produces normal sexual response in a healthy adult. The A.L.I. Comment contains the following statement:

> ". . . we reject the prevailing tests of tendency to arouse lustful thoughts or desires because it is unrealistically broad for a society that plainly tolerates a great deal of erotic interest in literature, advertising and art, and because regulation of thought or desire, unconnected with overt misbehavior, raises the most acute constitutional as well as practical difficulties." (A.L.I. Model Penal Code, Tentative Draft No. 6, p. 10.)

Memoirs, of course, is literature that has "a great deal of erotic interest". It is a book about sex. But the interest of its heroine in sex is not morbid or shameful, nor is the interest of the normal adult reader. We respectfully refer the Court to portions of the record which have particular bearing on this point (R. 29-30, 33-34, 35-36, 37-38, 41-43, 101). The heroine-narrator's attitude toward sex is open

and essentially innocent, not leering or dirty. Her appreciation of sex is natural, not sick or perverted. Aberration is rejected and denounced. The book is directed toward life, not toward morbidity. The statement of the prevailing opinion of the Court of Appeals of Ontario, in holding *Memoirs* not obscene, is pertinent:

> "In my opinion, the book, read as a whole, has not about it that aura of morbidity nor that degree of suggestive pruriency which might render it obscene within the meaning of the Code." (*Queen* v. *S. Coles Co. Ltd.*, 44 Crim. Rep. 219.)

Any legislative attempt to do away with books that may excite sexual thoughts and desires becomes ludicrous when viewed against the realities of contemporary civilization. An eighteenth-century novel, no matter how much it may be devoted to the act of sex, can hardly add anything to the constant sexual prodding with which our environment assails us. Apart from the evidence offered, the Court can take judicial notice of the fact that our advertising, our motion pictures, our television and our journalism are in large measure calculated to produce sexual thoughts and reactions. We live in a sea of sexual provocation.

These aspects of our society may indeed be deplorable, but they are part of the contemporary culture within which, as this Court has held, cases like the present one must be judged. Surrounded as we are by strong and manifold stimulants to our sexual instincts, we cannot bring the force of law to bear upon the publication of a book on the ground that its effect on a reader may be that of "arousing him to libidinousness."

Nor do the references, in the prurient interest formula, to "the average person" and to "contemporary community standards" imply a broader brush of condemnation.

The theme of the portion of the *Roth* and *Alberts* opinion in which the prurient interest test is stated is the final rejection of the *Hicklin* rule (354 U.S. 476, at 488-489). *Hicklin* had notorious weaknesses: (*a*) it stressed isolated excerpts of the book in question; (*b*) it judged those excerpts by their effect on the particularly susceptible, and (*c*) it looked to fixed concepts of propriety, regardless of time, place and circumstances. The courts that refused to follow *Hicklin,* as the *Roth* and *Alberts* opinion says, (*a*) considered the book as a whole, (*b*) judged it according to its effect upon the normal healthy adult rather than upon the particularly susceptible, and (*c*) stressed current mores and reading habits as distinguished from the notions of propriety entertained by British judges of the mid-nineteenth century. This Court's use of the term "average person" was designed to remedy the second weakness of the *Hicklin* rule, and the use of the term "contemporary community standards" was designed to remedy the third.

The Court's repudiation of the *Hicklin* doctrine did not permit its replacement with a rule by which an "average" notion of what is objectionable should control the freedom to write and be read. Such a rule would forbid dissent in matters of taste, and would impose a tyranny no less repugnant to the constitutional guaranties than that imposed by *Hicklin.* It would be a direct contradiction of the Court's declaration that "All ideas . . . even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties . . ." (354 U.S. 476, 484).

The negation of the *Hicklin* test expressed in the phrases "average person" and "contemporary community standards" does not mean that the rights guaranteed by the First Amendment are to be determined by conducting a Gallup poll among the population at large. Where a statute purports to control general publication, the reference to "the average person" excludes as criteria the possible

responses and attitudes of special elements of the population. (A less intrusive statute, which might, for example, regulate sales to children, is to be distinguished from a statute that suppresses publication altogether.) The reference to "contemporary community standards" fixes attention on the historic fact that standards change. The phrases were meant, we submit, to make clear that it is today's normal adult reader who is to be kept in mind; they were not meant to limit writers and publishers to an average notion of what ought to be published, or to limit a minority of readers to what a majority might think good for them. The Court was not seeking to chain creative minds to the dead center of convention at a given moment in time.

The newspaper clippings and the magazines that are in evidence deal with the Profumo affair. They are illustrative of the contemporary community standards and the customary limits of candor that form the frame of reference for the application of the prurient interest test. They demonstrate the broad range of public tolerance toward reading materials. Newspapers and magazines, at about the time of the publication of the book in question, put before the public material remarkably similar to what is objected to in the book. Readers saw daily descriptions of prostitution, orgies, lesbianism, voyeurism, flagellation and other sexual excesses. It can hardly be maintained that what may be presented as present-day fact to the entire public may not be presented as two-hundred-year-old fiction to the book-buying portion of the public.

The entire discussion in the opinion of the majority below as to how it arrived at the conclusion that *Memoirs* fails the prurient interest test is as follows:

> "We have no doubt that the dominant theme of Memoirs appeals to prurient interest. The book is

> composed almost entirely of a series of episodes involving Lesbianism, voyeurism, prostitution, flagellation, sexual orgies, masturbation, fellatio, homosexuality, and defloration, all of which 'goes substantially beyond customary limits of candor in describing or representing such matters.' " (App. p. 38.)

From the catalog of episodes one may perhaps infer that it is the presence of aberrations that influenced the court.* We submit that the itemization does not constitute an accurate description of the book. The principal sexual interest of *Memoirs* is a normal heterosexual interest, and, as a number of the witnesses pointed out, Fanny Hill extols the normal sexual relationship and scorns the deviant. In any event, however, it is fundamental that no subject matter as such is excluded from the First Amendment guaranties. As to the way in which the subject matter is presented, we submit that *Memoirs* does not go "substantially beyond customary limits of candor", as those limits have been fixed by contemporary literature that is reputably published and publicly accepted.

Possibly the crucial words are "almost entirely". They suggest that the majority below based its conclusion on the amount of sexual material in *Memoirs*. But surely the extent to which a book deals with sex cannot determine the application of the test. If a book does not have that quality of essential nastiness and morbidity which identifies appeal to prurient interest, the quantity of sexual material in the book will not create it. Prurience is not a matter of arithmetic.

Earlier in its opinion, the majority states: "The fact that *Memoirs* may arouse sexual thoughts and desires is

*It may be noted that the court's list is very similar to the summary above of the items contained in the Profumo newspaper reports.

not, in itself, sufficient to deprive it of its constitutional protection'' (App. p. 37). The statement is unexceptionable, but the opinion does not otherwise make a case for condemnation under the prurient interest test. With all the respect due a distinguished court, it would seem that, despite the disclaimer, the majority found *Memoirs* prurient because it found *Memoirs* erotic. But whatever the reasoning behind the majority's elliptical statement, the conclusion it reached necessarily involves a departure from the prurient interest standards as they were set forth in *Roth* and applied in the subsequent *per curiam* decisions of this Court.

3. Memoirs is entitled to constitutional protection under the patent offensiveness test.

The term ''patent offensiveness'' is given definition by the facts of the case in which it first appeared. Apart from the effect of the *Manual Enterprises* publications upon those ''unfortunate persons whose patronage they were aimed at capturing'' (370 U.S. 478, 490), it is apparent from the descriptions of the publications (370 U.S. 478, 489-490, 526-527) that most adults would, as the Court did, recognize them for what they are. ''Patent offensiveness'', then, necessarily means something quite beyond a violation of standards of propriety or good taste. Not everything that the average person finds offensive can be called ''patently offensive'' within the meaning of *Manual Enterprises*. But, even if we were considering standards of taste rather than standards of constitutional law, Fanny Hill would do well:

> ''. . . she never utters an obscene word, rarely descends even to colloquialism, never to the clinical; she

indeed writes an elaborate literary language that would do credit to any master of baroque and poetic utterance—shall we say Henry James?—spoken in a drawing room. And it is not shabby baroque." (Pritchett, R. 32.)

"Mercifully *not* 'robust', or Rowlandsonian, [Cleland] is decorous not merely in vocabulary but down to the last cadence of his fine, plain prose." (Brophy, R. 40-41.)

". . . in an age when even serious authors treat the sexual act in terms of a case history or social protest (and the Olympia Press's professional pornographers are driven to exploit De Sadean whips, chains and intricate multiple interlacings to keep ahead of the uncensored press), Fanny Hill's straightforward heterosexuality must come as a shock. None of her escapades, for instance, are as unsavory as the AC-DC boy-meets-boy encounters of James Baldwin's 'Another Country', nor are they as grubbily explicit as the climactic sexual passage in Updike's 'Rabbit Run.'

"Certainly Fanny was no common harlot. Her 'Memoirs' combine literary grace with a disarming enthusiasm for an activity which is, after all, only human. What is more, she never uses a dirty word." (*Time,* R. 43.)

"Cleland was not a great writer, but he was a gifted one, and in my belief as much entitled to call himself an artist as Henry Miller. The chief difference between them is that Cleland presented normal sexual relations for what they are—the intensest pleasure man derives from his senses; Miller makes them revolting. I would prefer to have a child of mine read Cleland than Miller." (Adams, R. 29.)

"Patent offensiveness" may perhaps be found in a work such as *Tropic of Cancer,* a work entitled to protection for other reasons. But the term cannot appropriately be applied to *Memoirs.* Certainly erotic in subject matter, it is just as certainly, in its patent qualities, free from the extreme offensiveness that *Manual Enterprises* contemplates.

With respect to this test, the majority below, referring to the sentence supporting its conclusion on prurient interest, said only:

> "For the same reason, we hold Memoirs to be such an affront to current community standards as to constitute 'patent offensiveness.' "

This would make patent offensiveness turn on subject matter rather than on patent characteristics, and negate the point of *Manual Enterprises* that the question of patent offensiveness is not the same as the question of appeal to prurient interest.

4. Memoirs is entitled to constitutional protection under the social value test.

Although the formulation of the prurient interest test attracted a great deal of attention, the *Roth* and *Alberts* opinion contained another, more fundamental, limitation on anti-obscenity legislation. The statute in each case was attacked as unconstitutional *in toto* and there was no other issue. The majority accordingly undertook a comprehensive statement of the reasons why the First Amendment does not protect obscene material, and this necessarily entailed a description of just what this unprotected material is.

The majority held that it has two characteristics. One is its appeal to prurient interest, discussed above. The

other is its utter worthlessness. It is not every worthless publication, of course, that the statutes can affect; it must be a publication that appeals predominantly to prurient interest. Nor is it every publication considered prurient that the statutes can affect; it must be a publication "utterly without redeeming social importance." For unless the publication is worthless trash, it is not possible to justify its suppression in the face of a Constitution that forbids abridgement of freedom of the press.

Laws affecting speech or writing have, of course, been held to have a valid operation in spite of the First Amendment guaranties. The *Roth* majority referred to cases that had so held. The cited cases involved situations in which the speech or writing amounted to conduct rather than expression, or was so entwined with conduct that the behavioral rather than the expressive aspect dominated.* Prohibitory laws might also operate where material is so utterly devoid of value that it need not be regarded as speech or writing at all. This last category provided both

*_United States_ v. _Harriss_, 347 U.S. 612 (disclosure provisions of the Federal Lobbying Act); _Breard_ v. _Alexandria_, 341 U.S. 622 (municipal ordinance prohibiting peddlers from calling upon private residences without invitation); _Teamsters Union_ v. _Hanke_, 339 U.S. 470 (state court injunction against picketing); _Kovacs_ v. _Cooper_, 336 U.S. 77 (municipal ordinance against sound trucks emitting "loud and raucous noises"); _Prince_ v. _Massachusetts_, 321 U.S. 158 (state statute prohibiting newspaper sale on the streets by minors); _Labor Board_ v. _Virginia Electric & Power Co._, 314 U.S. 469 (coercion by employer under National Labor Relations Act; ". . . conduct, though evidenced in part by speech, may amount, in connection with other circumstances, to coercion within the meaning of the Act" (p. 477)); _Cox_ v. _New Hampshire_, 312 U.S. 569 (state statute requiring a license for parade); _Schenck_ v. _United States_, 249 U.S. 47 (the "clear and present danger" test applied to a conspiracy to circulate materials influencing persons to obstruct a wartime draft). 354 U.S. 476, 484.

the constitutional justification for anti-obscenity legislation and, within the area bounded by the prurient interest standards, the constitutional definition of obscenity. Anti-obscenity statutes, the majority held, have a discernible, though severely limited, validity. Legislatures, in the pursuit of goals relating to prevailing concepts of immorality or offensiveness, may ordain suppression despite the strong language in which the First Amendment is cast. But they may do this only with publications that have no social value, and only because they have no social value.

The First Amendment, of course, has its principal function where the majority disapproves. Where a work of any value is in issue, the fact that most of the citizenry views it as immoral or offensive cannot justify a forcible silencing. On the other hand, it may be said of material utterly without value that it does not rise to the level of writing—that is, "the press"—within the meaning of the Constitution. Nothing is lost. Once obscenity is defined as that which has no value, then—and only then—room can be found in our constitutional structure for anti-obscenity legislation. The mark of suppressible obscenity inheres in the constitutional justification of the suppressive legislation.

The social value test supplied not only doctrinal validity but practical workability. The prurient interest test was itself a significant step toward clarity. The elimination of the spectacular weaknesses of *Hicklin* represented an important gain, and the word "prurient" provided some content and character where earlier formulas provided only amorphous emotional connotations. But the prurient interest test, standing alone, left the law to deal with these grave yet delicate questions in terms of judicial reactions that must remain largely subjective.

In determining whether a book is prurient or patently offensive, the court has no evidence apart from the book itself. Judgment is merely a matter of direct and personal reaction. There is the challenged book, and the key word, and the court must decide whether they match or do not match; there is nothing in between. This is not the kind of work for which the process of trial is designed. Indeed, the traditional concept of trial becomes superfluous.

The social value test, on the other hand, adds a criterion that can be objectively applied, and by a process familiar to the law. Judges and jurors are no longer committed to a total reliance on their individual responses. Traditional judicial techniques come into play. There is evidence to be considered.

We are now on familiar judicial ground. Questions of value have long been handled by the courts, and there are time-tested methods at hand. Value is shown by what has taken place outside the court, and, at the trial itself, by the testimony of those who may be qualified as expert in the field.

Real estate experts, for example, give testimony in condemnation cases and in tax cases, and security analysts estimate earning power in corporate reorganization cases. Similarly, those who are qualified to speak about the particular values alleged to reside in a book can offer the court expert testimony on the point. There are among us individuals who, by reason of training and experience, are better qualified than most to appraise the literary or artistic or other merit of a book. Their opinion testimony provides the material of decision. Opinion as to value is not, of course, opinion as to whether a book is prurient or not prurient, or obscene or not obscene; these words signal conclusions of law, which are the business of the court, not of the witness. The function of the witness is to supply data upon which the court may determine whether the book

has that value which brings it within the protection of the First Amendment.

Another source of objective evidence is documentary. Where there are book reviews, or critical essays, additional data can be presented to the court. The situation is analogous to appraisals made, apart from the litigation, where economic value is in issue. Material "utterly without social importance" does not become the subject of critical comment. There naturally will be differences of opinion about any given book, but the fact that there is serious discussion of the work, by recognized critics and scholars, published in established periodicals, is an objective fact of the utmost significance.

That the presence of value in a book, thus proved, entitles it to the protection of the First Amendment has been the law, we submit, since the date of *Roth* and *Alberts*. Most high state courts that considered the matter agreed, even before *Grove Press* and *Jacobellis,* and those cases confirmed the proposition.*

In the present case there are both kinds of evidence. Respected critics have written about the book, and what they wrote is part of the record. In addition, there appeared in court, to face whatever rigors cross-examination might produce, distinguished faculty members from the colleges and universities of the Commonwealth of Massachusetts. Some assign the book a high place in the echelons of literature. Thus Pritchett feels that Cleland succeeded where D. H. Lawrence failed (R. 34-35). Holland ranks *Memoirs,* among eighteenth-century novels, above Defoe's celebrated *Moll Flanders* (R. 79). Others do not rate the book so highly. But all of the witnesses and all of the documentary evidence agree upon the fundamental point: *Memoirs* is a work of literature that has considerable

*See cases cited on page 15, above.

value.* We respectfully refer the Court to the passages that are cited in our Statement of Facts above.†

The majority below gave the social value test only grudging recognition, referring to it as "one other possible test" (App. p. 39). It then formulated the test in a way which, we submit, negates the decisions of this Court. The opinion below states that the test does not require that a book "must be unqualifiedly worthless before it can be deemed obscene" (App. p. 40). The statement cannot be reconciled with this Court's statement that the obscene, in the constitutional sense, is only that which is "utterly without redeeming social importance". There is no discernible distinction between the concept of material that utterly lacks worth and the concept of material that is unqualifiedly worthless.

The majority below not only contradicted this Court's announcement of the applicable principle; it also erred on

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*Even opposing counsel were impressed with the values of the book. The Attorney General's brief to the Supreme Judicial Court stated (at pages 6 and 7) that the writing in *Memoirs* is "quite clever"; that there is "frequent use of highly colorful metaphor"; that there is no reason to disagree with the expert testimony to the effect that "the writing style is artistic"; and, in a sentence instinct with admiration, that there is "a comic flair to the writing that is inescapable". Contrast the statement of Chief Judge Desmond of the New York Court of Appeals on *Tropic of Cancer*. ". . . Not only is there in it no word or suggestion of the romantic, sentimental, poetic or spiritual aspects of the sex relation, but it is not even bawdy sex or comic sex or sex described with vulgar good humor. . . ." (*People* v. *Fritch*, 13 N.Y. 2d 119, at 126.)

†The Attorney General produced one witness in opposition. His opinions were not so much literary evaluations as legal conclusions; his concepts, moreover, differed from those of the courts (R. 23). His misuse of language (R. 20, 22) indicated that he did not approach the subject with a great deal of detachment. Finally, he could not recall important aspects and events of the book about which he was testifying (R. 25).

the constitutional fact of the value to be found in *Memoirs*, ascribing to the book only "some minimal literary value" (App. p. 40). A publication might have considerably less value than the testimony and the documentary evidence show *Memoirs* to have and still rise above the level of "minimal literary value".

The opinion below mentions, in slighting, advocates' terms, that the book "contains a moral" (App. p. 40). But the critics treated Fanny's thoughts about life and love as seriously meant, and entitled to serious reading. Brophy puts it this way: "She is unrepentant in pleasure or lust; but she truthfully perceives—and that, I believe, without the sort of hypocrisy that greater writers like Defoe or Richardson insinuated—that she had physical pleasure in lust but physical, spiritual pleasure in love" (R. 32). Similarly, Pritchett finds Fanny's final statement to be "without, as she rightly claims, hypocrisy. . . ." (R. 40). The witnesses gave more detailed testimony to the same general effect—that the observations, ideas and moral conclusions of the book are thoughtful, substantial and perceptive. (See, for examples, pages 46-47, 61, 70, 73, 96 and 101 of the Record.)

Referring to the expert testimony, the majority said, in passing "much of [it] was strained" (App. p. 40). We respectfully but emphatically disagree. The testimony was careful and specific. The witnesses were not indulging in flights of critical fancy. What they had to say made sense on direct examination, and continued to make sense under persistent cross-examination. The witnesses are individuals of high academic standing, who would be most unlikely to jeopardize that standing by giving sworn testimony that might return to embarrass them. It is one thing to assert that a book is "not obscene" or "not pornographic". These are conclusory statements that can al-

ways be defended on semantic grounds. It is quite another thing for a professional critic or teacher to analyze a book, to give detailed testimony about what values he sees in it, and to appraise the book as against other works of literature. Even if a single individual might conceivably be so irrational as to do what the majority below suggests, it is not conceivable that the entire roster of these distinguished men should be willing to give disingenuous, distorted or otherwise "strained" testimony.*

*Although it is not part of this record, we invite the Court's attention to matters of record in other cases involving this book. The Publisher defended *Memoirs* at three trials. Only three of the witnesses (including the Publisher's president) appeared at more than one of the trials. It was not a matter of finding a few people who would be willing to speak in defense. A large number of highly reputable critics and scholars regarded the book as one that had considerable merit, and they were willing to say so, under oath, in court. The following testified in the New York and New Jersey trials: J. Donald Adams, for many years editor-in-chief of *The New York Times Sunday Book Review;* Eric Bentley, critic, dramatist and Professor of Dramatic Literature at Columbia; Louis Untermeyer, poet, critic and anthologist; Eliot Fremont-Smith, book review editor and regular critic for *The New York Times;* Clarence Decker, Professor of Literature and Vice-President at Fairleigh Dickinson; John McCormick, Chairman of the Department of Comparative Literature at Rutgers; John Hollander, poet and Assistant Professor of English at Yale; Gerald Willen, Assistant Professor of English at Hunter College; Paul Fussell, Associate Professor of English and Director of English Graduate Studies at Rutgers; and David Burrows, Assistant Professor of English at Douglas College For Women.

In the one case that involved a motion for preliminary injunction, the following submitted affidavits or letters attesting the merit of the work: the well-known critics Alfred Kazin, Maxwell Geismar, Dwight MacDonald and Edward B. Garside, together with John Gassner, Sterling Professor at Yale, Barbara Epstein, co-editor of *The New York Review of Books,* and Norman Podhoretz, editor-in-chief of *Commentary* magazine.

It thus appears that in each locality where the book was called into question there was an ample number of highly qualified people

Moreover, there was corroboration for what the witnesses said in the published essays of Pritchett, Adams and Brophy, and in the introduction by Peter Quennell. Celebrated critics thus submitted to the judgment of the literary world opinions very similar to those which the witnesses submitted to the judgment of the court. In neither case is it realistic to suppose that the opinion was less than the best that the writer or the witness had to offer.

5. THE HARD-CORE PORNOGRAPHY TEST LEADS TO THE SAME RESULT.

If "hard-core pornography" is taken as the definition of what may be constitutionally suppressed under anti-obscenity legislation, the result in the present case is the same. Analytically, the concept appears to involve all three standards discussed above. That is, it would seem to be a combination of morbidity, extreme offensiveness and utter worthlessness that denotes hard-core pornography; no such syndrome can be attributed to *Memoirs*. If the concept is considered not analytically but empirically, there is a striking contrast between *Memoirs* and publications that have been held to be obscene: see *People* v. *Finkelstein*, 11 N.Y. 2d 300, 183 N.E. 2d 661, cert. den. 371 U.S. 863; *Burke* v. *Kingsley Books, Inc.*, 208 Misc. 150, 142 N.Y.S. 2d 735, affd. (on another issue) *sub nom. Kingsley Books, Inc.*, v. *Brown*, 354 U.S. 436; *People* v. *Sikora*, 32 Ill. 2d 260, 204 N.E. 2d 768. And comparison with publications that have been deemed not obscene appears to exclude the possibility that

ready to testify that *Memoirs* has substantial value. (Not all who were willing to testify were used as witnesses.) If they represented a negligible minority of critical opinion, it is strange that no member of the hypothetical majority (with the dubious exception of Dr. Collins) would have appeared to give contrary testimony at any of the three trials.

Memoirs might be deemed hard-core pornography; we refer to the various materials in the *per curiam* reversals that followed *Roth,* to the magazine in *People* v. *Richmond County News, Inc.,* 9 N.Y. 2d 578, 175 N.E. 2d 681 (see the description of the magazine at 9 N.Y. 2d 578, 594), to the rough and shocking *Tropic of Cancer* of *Grove Press, Inc.,* v. *Gerstein,* 378 U.S. 577, and to the tailored vulgarities of *A Quantity of Books* v. *Kansas,* 378 U.S. 205.

Conclusion.

This appeal poses, in a case where review by the Court is particularly appropriate, pressing questions with respect to what may be written and published, questions that involve the meaning of earlier decisions of the Court. We have suggested answers to those questions, but it is evident that there is substantial disagreement both among courts below and within courts below. The resolution of the issues growing out of the suppression of *Memoirs* will, we submit, do much to clarify an important and troubled field of constitutional law.

Respectfully submitted,

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Rembar and Zolotar,
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New York 17, N.Y.

Appendix.

Judgment-Rescript.

Commonwealth of Massachusetts.
Supreme Judicial Court for the Commonwealth,
At Boston,

April 22 1965.

In the case of

Attorney General

vs.

A Book Named "John Cleland's Memoirs of a Woman of Pleasure." pending in the Superior Court for the County of Suffolk

Ordered, that the following entry be made in the docket; viz.,—Decree affirmed.

By the Court,

/s/ RICHARD A. McLAUGHLIN, Clerk.

April 22, 1965.

A true copy,
Attest:

RICHARD A. McLAUGHLIN
Clerk of the Supreme Judicial
Court for the Commonwealth

May 24, 1965.

BRIEF STATEMENT OF THE GROUNDS AND REASONS OF THE DECISION:

See opinion on file.

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. Superior Court
No. 82126 Eq.

EDWARD W. BROOKE,
Attorney General
v.
A BOOK NAMED, "JOHN CLELAND'S MEMOIRS OF A WOMAN OF PLEASURE", (COMMONLY KNOWN AS FANNY HILL)

FINAL DECREE AFTER RESCRIPT

This cause came on at this sitting after rescript from the Supreme Judicial Court and, pursuant to said rescript, it is ORDERED, ADJUDGED and DECREED that the book named "John Cleland's Memoirs of a Woman of Pleasure", commonly known as "Fanny Hill", is obscene, indecent and impure under the provisions of G. L. c. 272, §§ 28C, 28E and 28F, as amended by St. 1945, c. 278.

And it is further ORDERED, ADJUDGED, DECLARED and DECREED that the above-named book is not entitled to the protection of the First and Fourteenth Amendments to the Constitution of the United States against action by the Attorney General or other law enforcement officer pursuant to the provisions of G. L. c. 272, § 28B, or otherwise.

By the Court, (Kalus, J.)
THOMAS F. BROPHEY
Asst. Clerk

Entered June 10, 1965

ATTORNEY GENERAL *vs.* A BOOK NAMED "JOHN CLELAND'S MEMOIRS OF A WOMAN OF PLEASURE."

Suffolk. January 8, 1965.—April 22, 1965.

Present: WILKINS, C.J., SPALDING, WHITTEMORE, CUTTER, KIRK, SPIEGEL, & REARDON, JJ.

Obscenity, Indecency or Impurity. Book. Constitutional Law, Freedom of speech, Freedom of the press.

Suit in equity heard in the Superior Court by *Macaulay*, J.

SPALDING, J. This is an appeal from a final decree holding the book, "John Cleland's Memoirs of a Woman of Pleasure" (Memoirs), more commonly known as "Fanny Hill," obscene, indecent and impure under G. L. c. 272, §§ 28C, 28E, and 28F (inserted by St. 1945, c. 278, § 1).[1] The petition was brought by the Attorney General. The publisher of the book, G. P. Putnam's Sons, intervened as a party. No jury trial having been claimed under § 28D, the case was heard by a judge. The evidence consisted of the book, various newspaper articles, book reviews and the testimony of several experts in the field of literature. The

[1] Section 28C reads, in relevant part, "Whenever there is reasonable cause to believe that a book which is being imported, sold, loaned or distributed . . . is obscene, indecent or impure, the attorney general . . . shall bring an information or petition in equity . . . directed against said book by name." Then follows a provision relating to a "reasonable cause" hearing, notice to interested persons, and an interlocutory adjudication. Section 28E provides for an adjudication against the book, in the event of default, "if the court finds that the book is obscene, indecent or impure . . . ." Section 28F provides for a contested hearing. "At such hearing the court may receive the testimony of experts and may receive evidence as to the literary, cultural or educational character of said book and as to the manner and form of its publication, advertisement, and distribution."

judge made careful and complete findings of fact and discussed the relevant law exhaustively.

Memoirs was written in England in 1749. For over two centuries it has had for the most part a surreptitious circulation. Memoirs has, for example, previously been a source of litigation in this Commonwealth (see *Commonwealth* v. *Holmes,* 17 Mass. 336), and very recently it has been the subject of decisions by other courts. See *Larkin* v. *G. P. Putnam's Sons,* 14 N. Y. 2d 399; *G. P. Putnam's Sons* v. *Calissi,* 86 N. J. Super. 82.

The sole question is whether the publication of Memoirs is protected by the First Amendment to the United States Constitution, as made applicable to the States by the Fourteenth Amendment. Since a majority of the court held in *Roth* v. *United States,* 354 U. S. 476, 485, "that obscenity is not within the area of constitutionally protected speech or press," the question becomes one of determining whether or not Memoirs is obscene.

The book takes the form of two letters written by a prostitute in which she recounts her life since she, a country girl, was abandoned in London. It concentrates on her sexual experiences, both normal and abnormal, which are described in minute detail. Memoirs, as is conceded by the intervener, is erotic. Erotica and obscenity, however, are not synonymous. The fact that Memoirs may arouse sexual thoughts and desires is not, in itself, sufficient to deprive it of its constitutional protection. If the contrary were the case, the public could be deprived of many of the world's greatest literary and artistic works. Our task, then, is to trace, as best we can, the "dim and uncertain line" which separates obscenity from that which is protected by the First Amendment. See *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58, 66; *Jacobellis* v. *Ohio,* 378 U. S. 184, 187. We are under no illusions as to the difficulties involved in "facing up to the tough individual problems of

constitutional judgment involved in every obscenity case." *Roth* v. *United States,* 354 U. S. 476, 498.

The first Supreme Court case to face the obscenity issue squarely was *Roth* v. *United States,* 354 U. S. 476.[1] The majority opinion in that case established the following test: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." *Id.* at 489. In a footnote the majority clarified what their notion of "prurient" was by quoting with approval Am. Law. Inst., Model Penal Code, § 207.10 (2) (Tent. draft, No. 6, 1957) which defined that term as ". . . a shameful or morbid interest in nudity, sex, or excretion."[2] *Roth* v. *United States, supra,* at 487, n. 20.

We have no doubt that the dominant theme of Memoirs appeals to prurient interest. The book is composed almost entirely of a series of episodes involving Lesbianism, voyeurism, prostitution, flagellation, sexual orgies, masturbation, fellatio, homosexuality, and defloration, all of which "goes substantially beyond customary limits of candor in describing or representing such matters." Am. Law. Inst., Model Penal Code, § 251.4 (1) (Proposed Official Draft, May 4, 1962). See *Jacobellis* v. *Ohio,* 378 U. S. 184, 191. For the same reason, we hold Memoirs to be such an affront to current community standards as to constitute "patent offensiveness." See *Manual Enterprises, Inc.* v. *Day,* 370 U. S. 478, 482. We would reach this result whether we ap-

[1] This case, as well as all but the most recent authority, is fully discussed in *Attorney Gen.* v. *"Tropic of Cancer,"* 345 Mass. 11. We need not, therefore, elaborate upon the general development of this area of the law.

[2] The same definition of "prurient" has been adopted by Am. Law. Inst., Model Penal Code, § 251.4 (1) (Proposed Official Draft, May 4, 1962).

plied local community or national standards. See *Jacobellis* v. *Ohio, supra,* at 193 (opinion of Brennan, J.), which indicates national standards should be used. But see dissent of Warren, C.J., in that case at page 200, which takes the position that obscenity is to be defined by local community standards.

There is one other possible test which must be considered. The majority opinion in the *Roth* case went on to say that "implicit in the history of the First Amendment is the rejection of obscenity as *utterly without redeeming social importance*" (emphasis supplied) *Id.* at p. 484. While it does not clearly emerge from the opinion whether "social importance" is an independent standard, subsequent decisions shed some light on the matter.

In *Jacobellis* v. *Ohio, supra,* 191 (opinion of Brennan, J., concurred in by Goldberg, J.), the view was expressed that the constitutional status of material cannot "be made to turn on a 'weighing' of its social importance against its prurient appeal, for a work cannot be proscribed unless it is 'utterly' without social importance." See *Tralins* v. *Gerstein,* 378 U. S. 576 (per curiam), and *Grove Press, Inc.* v. *Gerstein,* 378 U. S. 577 (per curiam). Thus it would appear that unless a work is "utterly without social importance" it cannot be deemed obscene. For views which would extend the constitutional protection even further see *Roth* v. *United States,* 354 U. S. 476, 508 (dissent of Douglas, J.); *Jacobellis* v. *Ohio,* 378 U. S. 184, 196 (opinion of Black, J.); *A Quantity of Books* v. *Kansas,* 378 U. S. 205, 213 (opinion of Black, J.).

The trial judge, after an exhaustive and able discussion of the relevant decisions, ruled that the Attorney General, to maintain his petition, must meet the following three tests: "*First,* the 'prurient interest' test, which, because of the holding in the '*Tropic of Cancer*' (345 Mass. 11) case must be shown to be 'hard core pornography'; *Second,* the

'patent offensiveness' test; and *Third,* the 'social value' test." He further ruled that the "[f]ailure . . . to sustain the standards that any one of these tests is designed for will result in an adjudication that the book . . . [is not] obscene in a constitutional sense." Whether the Supreme Court of the United States has laid down three independent standards, all of which (as the judge ruled), must be satisfied, need not be decided, for in our opinion Memoirs meets all the tests.[1] As indicated above, we have little doubt that Memoirs' dominant theme appeals to prurient interests and that it is patently offensive.

It remains to consider whether the book can be said to be "utterly without social importance." We are mindful that there was expert testimony, much of which was strained, to the effect that Memoirs is a structural novel with literary merit; that the book displays a skill in characterization and a gift for comedy; that it plays a part in the history of the development of the English novel; and that it contains a moral, namely, that sex with love is superior to sex in a brothel. But the fact that the testimony may indicate this book has some minimal literary value does not mean it is of any social importance. We do not interpret the "social importance" test as requiring that a book which appeals to prurient interest and is patently offensive must be unqualifiedly worthless before it can be deemed obscene. Upon a consideration of all the evidence, including the book, we are of opinion that Memoirs is not endowed with constitutional protection.

We have not overlooked the fact that Memoirs was recently held not to be obscene in the constitutional sense by

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[1] A fourth criterion, which involves determining whether material is hard core pornography, has been suggested. See *Jacobellis* v. *Ohio, supra,* pp. 184, 197 (opinion of Stewart, J.); *Attorney Gen.* v. *"Tropic of Cancer,"* 345 Mass. 11, 19. But the Supreme Court has never so held.

a closely divided court in *Larkin* v. *G. P. Putnam's Sons,* 14 N. Y. 2d 399. But the Superior Court of New Jersey in a well considered opinion has reached a contrary conclusion with respect to this book in *G. P. Putnam's Sons* v. *Calissi,* 86 N. J. Super. 82. We find the reasoning in that decision and the opinions of the dissenting judges in the *Larkin* case more persuasive.

It follows that the entry must be

Decree affirmed.

WHITTEMORE, J. (dissenting, with whom Spiegel, J., joins) This book cannot be ruled to be "utterly without redeeming social importance." *Roth* v. *United States,* 354 U. S. 476, 484. *Jacobellis* v. *Ohio,* 378 U. S. 184, 191.

In the view of one or another or all of the following viz., the chairman of the English department at Williams College, a professor of English at Harvard College, an associate professor of English literature at Boston University, an associate professor of English at Massachusetts Institute of Technology, and an assistant professor of English and American literature at Brandeis University, the book is a minor "work of art" having "literary merit" and "historical value" and containing a good deal of "deliberate, calculated comedy." It is a piece of "social history of interest to anyone who is interested in fiction as a way of understanding society in the past."[1] A saving grace is

[1] One of the witnesses testified in part as follows: "Cleland is part of what I should call this cultural battle that is going on in the 18th century, a battle between a restricted Puritan, moralistic ethic that attempts to suppress freedom of the spirit, freedom of the flesh, and this element is competing with a freer attitude towards life, a more generous attitude towards life, a more wholesome attitude towards life, and this very attitude that is manifested in Fielding's great novel 'Tom Jones' is also evident in Cleland's novel. . . . [Richardson's] 'Pamela' is the story of a young country girl; [his] 'Clarissa' is the story of

that although many scenes, if translated into the present day language of "the realistic, naturalistic novel, could be quite offensive" these scenes are not described in such language. The book contains no dirty words and its language "functions . . . to create a distance, even when the sexual experiences are portrayed." The response, therefore, is a literary response. The descriptions of depravity are not obscene because "they are subordinate to an interest which is primarily literary"; Fanny's reaction to the scenes of depravity was "anger," "disgust, horror [and], indignation." The book "belongs to the history of English literature rather than the history of smut."[2]

The book, according to its publisher, has been purchased by a considerable number of college libraries including the Harvard and Massachusetts Institute of Technology libraries.

It is not the court's function to consider whether to agree or disagree with the appraisal of the book by academic witnesses. The controlling circumstance is that the work is evaluated by representative scholars and teachers of English literature as a work of some literary and historical significance notwithstanding its patently pornographic aspects. I construe the concept embodied in the term "social importance" as used by the United States Supreme Court to

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a woman trapped in a house of prostitution. Obviously, then, Cleland takes both these themes, the country girl, her initiation into life and into experience, and the story of a woman in a house of prostitution, and what he simply does is to take the situation and reverse the moral standards. Richardson believed that chastity was the most important thing in the world; Cleland and Fielding obviously did not and thought there were more important significant moral values."

[2] In the opinion of the other academic witness, the headmaster of a private school, whose field is English literature, the book is without literary merit and is obscene, impure, hard core pornography, and is patently offensive.

include the literary and historical field. Hence, I believe that the publication of this book is protected by the First Amendment as expounded in the Supreme Court decisions. *Larkin* v. *G. P. Putnam's Sons,* 14 N. Y. 2d 399.

I assume that the book would be offensive to some, perhaps a great many, readers. So are numerous other books now published that use four letter words freely, portray sexual encounters explicitly and with a detail of description far beyond anything used by Cleland, and often appear intended to degrade and debase the sexual relationship. A purpose of some such books appears to be the destruction of concepts deemed basic to the existing social and moral order. If the measure intended by the *Roth* case, *supra,* were of possible effect on prevailing values, books like "Tropic of Cancer" would, I submit, be banned. But on such a scale "Fanny Hill" appears of slight, if any, weight and not worth the attention that efforts to ban inevitably bring. I agree with the opinion in the *Larkin* case, *supra,* that "[i]t is unlikely 'Fanny Hill' can have any adverse effect on the sophisticated values of our century." 14 N. Y. 2d 399, 403–404.

Freedom to read, as I construe it, means that such a book as this is to be available to those who wish to read it and that the persisting urge of others to bar its publication is effectively restrained. There is, of course, no obligation upon any member of the general public to read this book.

CUTTER, J. (dissenting) I disagree with the majority opinion for reasons in part somewhat different from those stated by Mr. Justice Whittemore and Mr. Justice Spiegel.

The book seems to me offensive and unpleasant in numerous respects. In my opinion, it could reasonably be found that distribution of the book to persons under the age of eighteen would be a violation of G.L. c. 272, § 28,[1] as tending

[1] Section 28 (as amended through St. 1959, c. 492, § 1), reads in part as follows: "Whoever sells or . . publishes for the

to corrupt the morals of youth. Despite the propensity of some young people to regard forbidden territory as a challenge to its exploration, it is not for the courts to determine whether it is wise to seek to prevent sale of such a book to persons under eighteen. I perceive no constitutional obstacle to treating as a criminal offence the sale of this book to persons under eighteen.[2]

It is quite another thing effectually to prohibit sale of the book to all adults in Massachusetts by declaring the book to be obscene. This proceeding presents much the same substantive question involved in *Butler* v. *Michigan*, 352 U. S. 380, 382–384. There the Supreme Court of the United States held that Michigan could not prevent the sale to adults of a book which might "have a potentially deleterious influence upon youth." Michigan then argued that it was promoting the public welfare "by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile inno-

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purpose of selling or distributing, to a person under the age of eighteen years a book . . . which is obscene . . . or manifestly tends to corrupt the morals of youth . . . shall be punished by imprisonment in the state prison for not more than five years or in a jail or house of correction for not more than two and one half years, or by a fine of not . . . more than five thousand dollars, or by both such fine and imprisonment in jail or the house of correction. In order to obtain a conviction under this section, it shall not be necessary to prove that the book . . . has been adjudged to be obscene . . . under the provisions of" §§ 28C to 28H.

[2] This, as a practical matter, might cause some booksellers to refuse to sell the book to persons recognizable as minors and to be somewhat cautious about its distribution. See Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5, 84–87. Although no declaration was expressly sought that sale of the book might be a violation of § 28, a determination that the book may not be sold to certain minors is a lesser form of relief which may be reasonably regarded as included in the greater equitable relief asked for under § 28C.

cence." Mr. Justice Frankfurter wisely said of this argument, "Surely, this is to burn the house to roast the pig. . . . [The] legislation [is] not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance and progress of a free society." Here the effort is so to apply the provisions of c. 272, §§ 28C–28H, as amended (see also §§ 28, 28A, and 28B), as to deprive adults of the opportunity to read written material which, in the opinion of some members of the academic community, has some historical, literary, sociological, or entertainment interest. Although the book seems to me pretty sorry material, there is no accounting for tastes. It is irrelevant that the taste of those who wish to read this tawdry writing seems deplorable to judges, or to prosecutors, or to persons of conventional habits, or to volunteer guardians of the morals of other adults. Although this book appears to me to have substantially less literary excuse than the book discussed in *Attorney Gen.* v. *"Tropic of Cancer,"* 345 Mass. 11, it cannot be said to be "utterly without redeeming social importance." As I read the recent United States decisions, they declare in effect (if not in words) that to justify literary censorship there must be absent any form of worth. See *Jacobellis* v. *Ohio,* 378 U. S. 184, 191–192.

I would (a) limit the relief granted to a declaration that distribution of this book to persons under the age of eighteen may be found to constitute a violation of c. 272, § 28, if that section is reasonably applied, and (b) expressly declare that, in view of the First Amendment, the book cannot be adjudged "obscene" in the sense in which that term

has been used in recent constitutional decisions of the Supreme Court of the United States.

Charles Rembar of New York (*Reuben Goodman* with him) for the intervener.

William I. Cowin, Assistant Attorney General (*John E. Sullivan,* Assistant Attorney General with him), for the Attorney General.

Henry P. Monaghan for the Civil Liberties Union of Massachusetts & others, amici curiae, submitted a brief.

Statutory Appendix.

General Laws, Chapter 272.

. . . . . .

Section 28B. Whoever imports, prints, publishes, sells, loans or distributes, or buys, procures, receives, or has in his possession for the purpose of sale, loan or distribution, a book, knowing it to be obscene, indecent or impure, or whoever, being a wholesale distributor, a jobber, or publisher sends or delivers to a retail storekeeper a book, pamphlet, magazine or other form of printed or written material, knowing it to be obscene, indecent or impure, which said storekeeper had not previously ordered in writing, specifying the title and quantity of such publication he desired, shall be punished by imprisonment in the state prison for not more than five years or in a jail or house of correction for not more than two and one half years, or by a fine of not less than one hundred dollars nor more than five thousand dollars, or by both such fine and imprisonment in jail or the house of correction. [As amended by St. 1960, c. 311.]

SECTION 28C. Whenever there is reasonable cause to believe that a book which is being imported, sold, loaned or distributed, or is in the possession of any person who intends to import, sell, loan or distribute the same, is obscene, indecent or impure, the attorney general, or any district attorney within his district, shall bring an information or petition in equity in the superior court directed against said book by name. Upon the filing of such information or petition in equity, a justice of the superior court shall, if, upon a summary examination of the book, he is of opinion that there is reasonable cause to believe that such book is obscene, indecent or impure, issue an order of notice, returnable in or within thirty days, directed against such book by name and addressed to all persons interested in the publication, sale, loan or distribution thereof, to show cause why said book should not be judicially determined to be obscene, indecent or impure. Notice of such order shall be given by publication once each week for two successive weeks in a daily newspaper published in the city of Boston and, if such information or petition be filed in any county other than Suffolk county, then by publication also in a daily newspaper published in such other county. A copy of such order of notice shall be sent by registered mail to the publisher of said book, to the person holding the copyrights, and to the author, in case the names of any such persons appear upon said book, fourteen days at least before the return day of such order of notice. After the issuance of an order of notice under the provisions of this section, the court shall, on motion of the attorney general or district attorney, make an interlocutory finding and adjudication that said book is obscene, indecent or impure, which finding and adjudication shall be of the same force and effect as the final finding and adjudication provided in section twenty-eight E or section twenty-eight F, but only until such final finding and adjudication is made or until

further order of the court. [As inserted by St. 1945, c. 278, § 1.]

SECTION 28D. Any person interested in the sale, loan or distribution of said book may appear and file an answer on or before the return day named in said notice or within such further time as the court may allow, and may claim a right to trial by jury on the issue whether said book is obscene, indecent or impure. [As inserted by St. 1945, c. 278, § 1.]

SECTION 28E. If no person appears and answers within the time allowed, the court may at once upon motion of the petitioner, or of its own motion, no reason to the contrary appearing, order a general default and if the court finds that the book is obscene, indecent or impure, may make an adjudication against the book that the same is obscene, indecent and impure. [As inserted by St. 1945, c. 278, § 1.]

SECTION 28F. If an appearance is entered and answer filed, the case shall be set down for speedy hearing, but a default and order shall first be entered against all persons who have not appeared and answered, in the manner provided in section twenty-eight E. Such hearing shall be conducted in accordance with the usual course of proceedings in equity including all rights of exception and appeal. At such hearing the court may receive the testimony of experts and may receive evidence as to the literary, cultural or educational character of said book and as to the manner and form of its publication, advertisement, and distribution. Upon such hearing, the court may make an adjudication in the manner provided in said section twenty-eight E. [As inserted by St. 1945, c. 278, § 1.]

SECTION 28G. An information or petition in equity under the provisions of section twenty-eight C shall not be open to objection on the ground that a mere judgment, order or decree is sought thereby and that no relief is or could be claimed thereunder on the issue of the defendant's knowl-

edge as to the obscenity, indecency or impurity of the book. [As inserted by St. 1945, c. 278, § 1.]

SECTION 28H. In any trial under section twenty-eight B on an indictment found or a complaint made for any offence committed after the filing of a proceeding under section twenty-eight C, the fact of such filing and the action of the court or jury thereon, if any, shall be admissible in evidence. If prior to the said offence a final decree had been entered against the book, the defendant, if the book be obscene, indecent or impure, shall be conclusively presumed to have known said book to be obscene, indecent or impure, or if said decree had been in favor of the book he shall be conclusively presumed not to have known said book to be obscene, indecent or impure, or if no final decree had been entered but a proceeding had been filed prior to said offence, the defendant shall be conclusively presumed to have had knowledge of the contents of said book. [As inserted by St. 1945, c. 278, § 1.]

GENERAL LAWS, CHAPTER 231A.

SECTION 1. The supreme judicial court, the superior court, the land court and the probate courts, within their respective jurisdictions, may on appropriate proceedings make binding declarations of right, duty, status and other legal relations sought thereby, either before or after a breach or violation thereof has occurred in any case in which an actual controversy has arisen and is specifically set forth in the pleadings and whether any consequential judgment or relief is or could be claimed at law or in equity or not; and such proceeding shall not be open to objection on the ground that a merely declaratory judgment or decree is sought thereby and such declaration, when made, shall have the force and effect of a final judgment or decree and be reviewable as such; provided, that nothing contained

herein shall be construed to authorize the change, extension or alteration of the law regulating the method of obtaining service on, or jurisdiction over, parties or affect their right to trial by jury. When a declaration of right, or the granting of further relief based thereon, shall involve the determination of issues of fact triable by a jury as of right and as to which a jury trial is duly claimed by the party entitled thereto, or issues which the court, in accordance with the practice of courts of equity, considers should be tried by a jury, such issues may be submitted to a jury in the form of questions, with proper instructions by the court, whether a general verdict be required or not. [As inserted by St. 1945, c. 582, § 1.]

. . . . . .

SECTION 6. In an action at law or suit in equity heretofore or hereafter brought to obtain a judgment or other consequential relief, whether such judgment or relief is granted or not, the court may make a binding determination as provided in this chapter upon application of any party made in his declaration, bill, petition or answer. [As inserted by St. 1945, c. 582, § 1.]

INDEX

	PAGE
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
QUESTIONS PRESENTED	2
STATEMENT	3
SUMMARY OF ARGUMENT	6
ARGUMENT	8
1. The Tests Are Independent	8
2. Memoirs Is Entitled to Constitutional Protection Under the Prurient Interest Test	10
3. Memoirs Is Entitled to Constitutional Protection Under the Patent Offensiveness Test	17
4. Memoirs Is Entitled to Constitutional Protection Under the Social Value Test	19
5. The Hard-Core Pornography Test Leads to the Same Result	28
6. Books Have a Special Place Among the Forms of Expression Protected by the First Amendment Against Suppression Under Anti-obscenity Statutes	29
CONCLUSION	31
APPENDIX	1a

TABLE OF AUTHORITIES

Cases

PAGE

Alberts v. *California*, 354 U. S. 476 .....2, 6, 8, 9, 10, 11, 12, 13, 14, 15, 17, 19, 20, 23

Attorney General v. *Tropic of Cancer*, 345 Mass. 11, 184 N. E. 2d 328 .....8, 9, 25

Breard v. *Alexandria*, 341 U. S. 622 20

Burke v. *Kingsley Books, Inc.*, 208 Misc. 150, 142 N. Y. S. 2d 735, aff'd sub nom., *Kingsley Books, Inc.*, v. *Brown*, 354 U. S. 436 28

City of Chicago v. *Kimmel*, 31 Ill. 2d 202, 201 N. E. 2d 386 9

Commonwealth v. *Holmes*, 17 Mass. 336 5

Commonwealth v. *Isenstadt*, 318 Mass. 543, 62 N. E. 2d 840 12

Commonwealth v. *Moniz*, 338 Mass. 442, 155 N. E. 2d 762 3

Cox v. *New Hampshire*, 312 U. S. 569 20

Freedman v. *Maryland*, 380 U. S. 51 29

G. P. Putnam's Sons v. *Calissi*, 86 N. J. Super. 82, 205 A. 2d 913 27

Grove Press, Inc. v. *Christenberry*, 175 F. Supp. 488; aff'd 276 F. 2d 433 14

Grove Press, Inc. v. *Gerstein*, 378 U. S. 577.....8, 9, 19, 23, 24, 29

Haiman v. *Morris*, Sup. Ct. of Illinois, 1964, Docket No. 37276 8

Jacobellis v. *Ohio*, 378 U. S. 184 .....8, 9, 11, 23

PAGE

Kingsley Books, Inc., v. *Brown*, 354 U. S. 436 28
Kovacs v. *Cooper*, 336 U. S. 77 20

Labor Board v. *Virginia Electric & Power Co.*, 314 U. S. 469 20
Larkin v. *G. P. Putnam's Sons*, 14 N. Y. 2d 399, 200 N. E. 2d 760 ..... 9, 27

Manual Enterprises, Inc. v. *Day*, 370 U. S. 478 .....3, 7, 8, 17-18, 19
McCauley v. *Tropic of Cancer*, 20 Wisc. 2d 134, 121 N. W. 2d 545 8
Mounce v. *United States*, 355 U. S. 180 11

People v. *Bruce*, 31 Ill. 2d 459, 202 N. E. 2d 497 9
People v. *Finkelstein*, 11 N. Y. 2d 300, 183 N. E. 2d 661, cert. den. 371 U. S. 863 28
People v. *Fritch*, 13 N. Y. 2d 119, 192 N. E. 2d 713... 9, 24
People v. *Richmond County News, Inc.*, 9 N. Y. 2d 578, 175 N. E. 2d 681 29
People v. *Sikora*, 32 Ill. 2d 260, 204 N. E. 2d 768.... 28
Prince v. *Massachusetts*, 321 U. S. 158 20

Queen v. *S. Coles Co. Ltd.*, 44 Crim. Rep. 219 16

Roth v. *United States*, 354 U. S. 476..2, 6, 8, 9, 10, 11, 12, 13, 14, 15, 17, 19, 20, 23, 29

Schenck v. *United States*, 249 U. S. 47 20
State v. *Hudson County News Co.*, 41 N. J. 247, 196 A. 2d 225 9
Sunshine Book Co. v. *Summerfield*, 355 U. S. 352 ... 11

Teamsters Union v. *Hanke*, 339 U. S. 470 20
Times Film Corp. v. *Chicago*, 355 U. S. 835 11
Tralins v. *Gerstein*, 378 U. S. 576 8

PAGE

United States v. *Associated Press*, 52 F. Supp. 362 .. 9
United States v. *Harriss*, 347 U. S. 612 20
United States v. *Klaw*, 350 F. 2d 155 29

Zeitlin v. *Arnebergh*, 59 Cal. 2d 901, 383 P. 2d 152, cert. den. 375 U. S. 957 ..... 8, 9

STATUTES

G. L. c 272, § 28B 2, 3

G. L. c 272, §§ 28C-28H 2, 3

28 U. S. C. § 1257 (2) 1

U. S. Constitution, First Amendment 8, 9, 21

U. S. Constitution, Fourteenth Amendment 2

MISCELLANEOUS

A. L. I. Model Penal Code, Tentative Draft No. 6, pp. 10, 29, 37 11

Clark, *The Nude* (Doubleday Anchor 1959) 14

Supreme Court of the United States

OCTOBER TERM, 196

A BOOK NAMED "JOHN CLELAND'S MEMOIRS OF A WOMAN OF PLEASURE", G. P. PUTNAM'S SONS (INTERVENOR), *Appellant*, *v.* ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, *Appellee.*	No. 368.

BRIEF FOR APPELLANT

Opinion Below

The opinion of the Supreme Judicial Court is reported at 206 N. E. 2d 403 (R. 120).

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. §1257(2). The appeal is from a judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts entered April 22, 1965, and from a final decree after rescript of the Superior Court of the Commonwealth of Massachusetts entered pursuant thereto. The judgment of the Supreme Judicial Court was entered April 22, 1965 and notice of appeal was filed June 21, 1965. Probable jurisdiction was noted by this Court on November 8, 1965.

Constitutional Provisions and Statutes Involved

The constitutional provisions involved are the First Amendment and the Fourteenth Amendment. The statutes involved are §§ 28C-28H of Chapter 272 of the General Laws of Massachusetts. They are set forth in the Appendix.

Questions Presented

The basic question on appeal is:

> Whether §§ 28C-28H of chapter 272 of the General Laws of Massachusetts, as applied to the book named "John Cleland's Memoirs of a Woman of Pleasure," are unconstitutional under the First Amendment of the United States Constitution as made applicable to the states by the Fourteenth Amendment of the United States Constitution.

Within the foregoing basic question there are comprised, among others, the following subsidiary questions:

> *(a)* Whether the publication of a book is protected by the First Amendment if it is not utterly without social importance within the meaning of *Roth* v. *United States* and *Alberts* v. *California,* 354 U. S. 476, and whether "John Cleland's Memoirs of a Woman of Pleasure" is such a book.
>
> *(b)* Whether the publication of a book is protected by the First Amendment if it does not appeal predominantly to prurient interest within the meaning of *Roth* v. *United States* and *Alberts* v. *California,* 354 U. S. 476, and whether "John Cleland's Memoirs of a Woman of Pleasure" is such a book.
>
> *(c)* Whether the publication of a book is protected by the First Amendment if it is not patently offensive within the meaning of *Manual Enterprises, Inc.,* v. *Day,* 370 U. S. 478, and whether "John Cleland's Memoirs of a Woman of Pleasure" is such a book.

Statement

Sections 28-C-28H of chapter 272 of the General Laws of Massachusetts establish a proceeding by which it may be adjudicated that a book is obscene, indecent and impure.[1] The consequence of the adjudication, under the law of Massachusetts, is the suppression of the book.[2] Appellee filed a petition seeking such an adjudication with respect to the book entitled "John Cleland's Memoirs of a Woman of Pleasure" published by G. P. Putnam's Sons. (R. 1). Pursuant to statutory provision, appellant intervened. (Appellee will be referred to as "the Attorney General", appellant as "the Publisher", and the book as *Memoirs*.) The Publisher interposed defenses resting solely on the proposition that the publication of the book is protected by the First Amendment.[3] The Superior Court rejected the Publisher's constitutional contentions, declared the book not entitled to the protection of the First Amendment, and adjudged it obscene (R. 117-118). The Supreme Judicial Court affirmed, the majority being "of opinion that *Memoirs* is not endowed with constitutional protection" (206 N. E. 2d, 403, 406; R. 124).

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[1] The second and third statutory adjectives will hereinafter be treated as subsumed in the term "obscene". See *Commonwealth* v. *Moniz*, 338 Mass. 442, 155 N. E. 2d 762.

[2] Section 28B of chapter 272 (the section immediately preceding those under which the proceeding was brought) provides imprisonment and fine for "Whoever . . . publishes . . . or distributes . . . a book, knowing it to be obscene . . . ." Section 28H provides that, if a proceeding such as the present one results in an adjudication that the book is obscene, then in any trial under § 28B the defendant "shall be conclusively presumed to have known said book to be obscene." Thus the question whether the book is obscene, as well as the question of scienter, can be litigated only in this proceeding and not in any subsequent criminal prosecution.

[3] The substantive invalidity of the statutes as applied to the book in question is asserted, but there is no issue of prior restraint or any other attack on the procedure established by the statutes.

At the trial a copy of the book was introduced by stipulation, and the Attorney General called one witness. The Publisher called several witnesses and introduced documentary evidence.

The following witnesses for the Publisher testified to the literary merit, historical importance and other values of the book: Fred Holly Stocking, Professor of English and Chairman of the English Department, Williams College; John M. Bullitt, Professor of English and Master of Quincy House, Harvard College; Robert H. Sproat, Associate Professor of English Literature, Boston University; Norman N. Holland, Associate Professor of English, Massachusetts Institute of Technology; and Ira Konigsberg, Assistant Professor of English and American Literature, Brandeis University.

The Attorney General's witness was Dr. John E. Collins, Headmaster of the Newman Preparatory School. He testified that the book "lacks literary merit" (R. 13), and, over objection that the questions called for conclusions of law, that the book is "obscene" (R. 12), "would arouse prurient interest" (R. 13), is "hard-core pornography" (R. 14), and is "patently offensive" (R. 15).

The Publisher's witnesses were all highly qualified (R. 41-42, 53, 63, 70-71, 84). Their qualifications were not equalled by those of the one witness for the Attorney General (R. 16).

The Publisher also introduced documentary evidence. On the matter of value, there are essays by the critics J. Donald Adams, V. S. Pritchett and Brigid Brophy, in *The New York Sunday Times Book Review, The New York Review of Books* and the *New Statesman,* respectively, and an article in *Time* magazine (R. 24-40). Portions of these documents, and of the testimony, also relate to the matter of contemporary community standards, as do the newspaper clippings and the copy of *Life* magazine that were introduced.

The Publisher's president testified as to the character of the Publisher and the distribution of the book (R. 82-84).

The volume in question contains the Cleland novel, an introduction by Peter Quennell and a historical note by the publisher. For over two centuries Cleland's work has had a wide, though for the most part surreptitious, circulation (Ex. A, Introduction and Note)[4]. In 1963 it was finally given open publication by G. P. Putnam's Sons, a company that has engaged in a century and a quarter of distinguished publishing (R. 82-83). The distribution of the book in no way departed from the normal course of Putnam's distribution; its only unusual feature was the relatively large number of orders from universities and libraries (R. 83)[5].

The testimony of the Publisher's witnesses on the matter of value, and the documentary evidence, were to the following effect:

Memoirs is one of a group of works important in the development of the English novel. A single decade—the 1740's—saw the publication of Richardson's *Pamela* and *Clarissa,* Cleland's *Memoirs* and Fielding's *Tom Jones.* The works of that decade may be said to have developed the English novel in the modern sense, and *Memoirs* is very much part of the process (R. 85-87).

Memoirs is, of course, an erotic novel. It is at the same time a work of art—careful and gifted writing that suc-

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[4] The 1821 case of *Commonwealth* v. *Holmes,* 17 Mass. 336, apparently involves *Memoirs,* although it does not appear whether it was Cleland's original novel or one of the distorted variations of it; there have been many instances of reverse Bowdlerization in the history of the work (Ex. A, pages xvi-xvii). The report of the case indicates that the prosecution was based primarily on an illustration.

[5] The Library of Congress requested the right to translate the book into Braille (R. 83).

ceeds as a novel. Read as a whole, it creates an effect that is primarily literary (R. 42, 48-49, 53, 54, 64, 65, 72, 85-86). The style is excellent (R. 24, 28, 30-31, 34-35, 36-37, 42, 43, 72-73, 85, 87-88), but the literary merits of the book go considerably beyond the stylistic.

Memoirs is structured fiction that contains a "plot with a purpose" (R. 43, 54-55, 59, 64, 73). It is a "novel of education", that is, a novel in which the principal character learns from experience and develops and changes (R. 42-43, 55). She participates in the experiences that she narrates and then reflects and generalizes upon them (R. 42-43, 45-46, 67). This reflection results in her acceptance and advocacy of certain values and ideas—the worth of pleasure and the place of pleasure; prudence, moderation and a rational view of the world; and finally an affirmation of the superiority of sex-in-love to the merely lustful (R. 25, 28-30, 36, 42-43, 45, 46, 55, 64-70, 88, 92).

Cleland displays the high literary talent of imaginative projection (R. 43). There is skill in characterization (R. 25, 42-43, 45, 56-57, 64-65, 67, 85) and a gift for comedy (R. 55-56). The book shows an acute psychological insight that in some instances anticipates recently-accepted psychological principles. The narrator condemns sexual deviation and holds it up to scorn, and at the same time explains certain types of aberration with considerable perception (R. 29, 70, 73, 80-81, 92-93). Apart from its intrinsic merits, the novel has historical value, both because of the information it gives concerning its period (R. 25, 28-29, 34-35, 43, 53, 56, 71-72, 85-86) and because of the part it plays in the history of English literature (R. 28-30, 55, 56, 71-72, 85-88).

Summary of Argument

The majority opinion in *Roth* and *Alberts* set forth two tests by which to identify material, challenged as obscene, that may be said to lie outside the protection of the First Amendment. One is the prurient interest test, under which

the material in question must have a narrowly-defined predominant appeal, morbid and unhealthy; appeal to the sexual interest of the normal adult is not enough. The other is the social value test; the First Amendment guarantees free publication unless the material is utterly without social importance, and social importance resides in works of literary or artistic value, as well as in the expository expression of ideas. It is only in the area where the perimeters of the two tests intersect that publication may be suppressed. *Manual Enterprises* set forth a third constitutional requirement for the application of anti-obscenity statutes—patent offensiveness.

These tests operate independently, so that only a book that fails by all of them may be suppressed. *Memoirs* fails by none of them. It is not morbid or unhealthy in its appeal to the normal adult. Its candor is within the limits set by contemporary community acceptance of reading matter. It is elegant and decorous, the very opposite of the patently offensive. And, as is shown by the book itself and the other evidence in the record, it is a work that has worth. Apart from its intrinsic values, it occupies a significant place in the development of the novel, and has interest as social history. Its intrinsic values are considerable. It contains the insights into human nature, and the advocacy of ideas, that we expect of good novels; its literary merit is not confined to the excellence of the writing. The concept of hard-core pornography does not fit at all.

Books are entitled to a position of primacy among the forms of expression protected by the First Amendment. A book of demonstrated value, such as the one before the Court, cannot be suppressed without violating the Amendment's guaranties.

Argument

1. The tests are independent.

In its opinion in *Roth* v. *United States* and *Alberts* v. *California*, 354 U. S. 476, this Court formulated two independent tests by which it can be determined whether a book, challenged as obscene, is entitled to the protection of the First Amendment. One has come to be called the "prurient interest" test, the other the "social value" test. A third test, that of "patent offensiveness", was stated in *Manual Enterprises, Inc.*, v. *Day*, 370 U. S. 478.

Predominant appeal to prurient interest and patent offensiveness (both considered in the light of contemporary community standards) supply the outer boundaries of the general field to which anti-obscenity legislation relates. But within this general field another criterion is to be applied; the statutes can have a constitutional application only if the challenged publication is utterly without redeeming social importance. Thus a book found to have intellectual content or artistic merit or some other form of social importance may not be suppressed, regardless of what conclusion might be reached if the prurient interest test were applied by itself and without regard to value.

It is the Publisher's position that a book must fail by all of these tests before it may be suppressed. If, in applying any one of them, the result is on the side of free expression, suppression is impermissible. The weight of state court authority supported this view of the holdings of the Court even before *Jacobellis* v. *Ohio*, 378 U. S. 184, *Grove Press, Inc.* v. *Gerstein*, 378 U. S. 577, and *Tralins* v. *Gerstein*, 378 U. S. 576, were decided. See *Attorney General* v. *Tropic of Cancer*, 345 Mass. 11, 184 N. E. 2d 328; *Zeitlin* v. *Arnebergh*, 59 Cal. 2d 901, 383 P. 2d 152, cert. den. 375 U. S. 957; *McCauley* v. *Tropic of Cancer*, 20 Wis. 2d 134, 121 N. W. 2d 545; but *cf. Haiman* v. *Morris*, Sup. Ct. of Illinois, 1964, Docket No. 37276 (not reported and withdrawn by order

dated July 7, 1964), and *People* v. *Fritch,* 13 N. Y. 2d 119, 192 N. E. 2d 713. After *Jacobellis* and *Grove Press,* the high state courts that had earlier rejected the view now accepted it. *City of Chicago* v. *Kimmel,* 31 Ill. 2d 202, 201 N. E. 2d 386; *People* v. *Bruce,* 31 Ill. 2d 459, 202 N. E. 2d 497; *Larkin* v. *G. P. Putnam's Sons,* 14 N. Y. 2d 399, 200 N. E. 2d 760.

Value is not simply a counterweight to prurient appeal; the process of decision is not a matter of measuring the quantum of importance against the quantum of prurience to see which predominates. Dominance is a factor only in the prurient interest test itself. The test of social importance is applied separately, and the presence of value assures the intervention of the First Amendment:

> "It follows that material dealing with sex in a manner that advocates ideas, *Kingsley Int'l Pictures Corp.* v. *Regents,* 360 U. S. 684, or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity and denied the constitutional protection. Nor may the constitutional status of the material be made to turn on a 'weighing' of its social importance against its prurient appeal, for a work cannot be proscribed unless it is 'utterly' without social importance." *Jacobellis* v. *Ohio,* 378 U. S. 184, 191.

That the values of expression need not be balanced against the dangers of appeal to prurient interest had been recognized in the high state courts as a necessary implication of *Roth* and *Alberts.* See *State* v. *Hudson County News Co.,* 41 N. J. 247, 265, 196 A. 2d 225, 235; *Zeitlin* v. *Arnebergh,* 59 Cal. 2d 901, 920, 383 P. 2d 152, 165; *Attorney General* v. *Tropic of Cancer,* 345 Mass. 11, 19, 184 N. E. 2d 328, 333. Indeed, it is a necessary implication of the First Amendment itself, whose adoption embodied acceptance of the detriments entailed in free expression. See *United States* v. *Associated Press,* 52 F. Supp. 362, 372 (S. D. N. Y.)

In the decision from which the present appeal is taken, the majority, although it indicated recognition of the fore-

going (206 N. E. 2d 403, 406; R. 123), stated that whether there were three independent standards "need not be decided, for in our opinion Memoirs meets all the tests" (206 N. E. 2d 403, 406; R. 123-124).

We submit that the tests are independent. If the proposition is not involved here, it is only because, with all due respect to the majority below, its opinion was wrong at every point: *Memoirs* is a book that under each of the tests must be found to come within the protection of the First Amendment.

2. MEMOIRS IS ENTITLED TO CONSTITUTIONAL PROTECTION UNDER THE PRURIENT INTEREST TEST.

When this Court, in *Roth* and *Alberts*, formulated the prurient interest test, it was not engaged in the simple exercise of synonym-swapping. Most earlier efforts to give meaning to the term "obscene" had ended by doing no more than replacing one epithet with another. "Obscene" was defined as "lewd", "lewd" as "lascivious", "lascivious" as "libidinous", "libidinous" as "licentious" and "licentious" as "lustful". "Immoral", "improper" and "impure" were tried, along with "indecent", "filthy" and "vulgar". The succeeding definitions had different trim, but no functional change, and the troublesome vagueness persisted.

In the last decade, however, it has been held that the matter must be considered in a constitutional context, and in that context *Roth* and *Alberts* dispelled a great deal of the vagueness. The Court chose a word that had not been prominent in earlier formulas—the word "prurient". It was a word whose peculiar connotations set it apart from its predecessors. The choice, of course, was not mere rhetoric. The purpose, we suggest, was to make it clear that the *Hicklin* test and its derivatives were no longer the law, and to define more narrowly and with greater depth the characteristic that must be found in the material upon which anti-obscenity statutes may operate.

The fact that a publication might appeal to the sexual interest of the reader, or might create a sexual response in him—the fact that the publication might, under the older definitions, be called lustful—would not satisfy the new and narrower prurient interest test. The etymological source of "prurient" is a word that means "itching", and its present-day connotations include "dirty", "nasty", "morbid", "unwholesome". Shortly before the date of *Roth* and *Alberts*, the word had been used in the American Law Institute Model Penal Code. The Code defined "prurient interest" as "a shameful or morbid interest in nudity, sex or excretion", and again as "an exacerbated, morbid or perverted interest". (A. L. I. Model Penal Code, Tentative Draft No. 6 (1957), Section 207.10(2), pages 10, 29, 37.) The Code and its Comment are referred to in the *Roth* and *Alberts* opinion.[6] Thus the Court's selection of the word "prurient" marked the abandonment of older definitions that had been laid down without regard to constitutional requirements. Subsequent decisions of the Court confirmed the proposition that expression may not be deemed unlawful merely because it may produce normal sexual response in a healthy adult. *Jacobellis* v. *Ohio*, 378 U. S. 184; *Mounce* v. *United States*, 355 U. S. 180; *Sunshine Book Co.* v. *Summerfield*, 355 U. S. 352; *Times Film Corp.* v. *Chicago*, 355 U. S. 835.

The Court's narrow definition of the material that might be proscribed conformed with—indeed was required by—the realities of our culture. A legislative attempt to do away with books on the ground that they may be sexually stimulating becomes ludicrous when viewed against what we see around us. An eighteenth-century novel, no matter how much devoted to the act of sex, can hardly

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[6] We do not cite the American Law Institute as authority; non-judicial comments that preceded the decisions of this Court on the interrelation of the First Amendment and anti-obscenity legislation are hardly authoritative. We cite it rather as confirming evidence of what was denoted by the particular word that the Court selected.

add to the constant sexual prodding with which our environment assails us. Apart from the evidence offered, the Court may take judicial notice of the fact that our advertising, our motion pictures, our television and our journalism are in large measure calculated to produce sexual thoughts and reactions. We live in a sea of sexual provocation.

These aspects of our society may well be deplored, but they are part of the contemporary culture within which, as this Court has held, cases like the present one must be judged. Surrounded as we are by strong and manifold stimulants to our sexual instincts, we cannot bring the force of law to bear upon the publication of a book on the ground that its effect on a reader may be that of "arousing lustful desire".[7]

Nor do the references, in the prurient interest formula, to "the average person" and to "contemporary community standards" imply a broader brush of condemnation. The theme of the portion of the *Roth* and *Alberts* opinion in which the prurient interest test is stated is the final rejection of the *Hicklin* rule (354 U. S. 476, at 488-489). *Hicklin* had notorious weaknesses: (*a*) it stressed isolated excerpts of the book in question; (*b*) it judged those excerpts by their effect on the particularly susceptible, and (*c*) it looked to fixed concepts of propriety, regardless of time, place and circumstances. The courts that refused to follow *Hicklin,* as the *Roth* and *Alberts* opinion says, (*a*) considered the book as a whole, (*b*) judged it according to its effect upon the normal adult rather than upon the particularly susceptible, and (*c*) stressed current mores and reading habits as distinguished from the notions of propriety entertained by British judges of the mid-nineteenth century. This Court's use of the term "average person" was designed to remedy the second weakness of

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[7] *Commonwealth* v. *Isenstadt,* 318 Mass. 543, 550, 62 N. E. 2d 840, 844, (holding Lillian Smith's *Strange Fruit* obscene).

the *Hicklin* rule, and the use of the term "contemporary community standards" was designed to remedy the third.

The "average person" is the subject whose responses are involved; he is not the arbiter whose views on publication are to decide the constitutional question. The Court's repudiation of the *Hicklin* doctrine did not permit its replacement with a rule by which an "average" notion of what is objectionable should control the freedom to write and be read. Such a rule would forbid dissent in matters of taste, and would impose a tyranny no less repugnant to the constitutional guaranties than that imposed by *Hicklin*. It would be a direct contradiction of the Court's declaration that "All ideas . . . even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties . . ." (354 U. S. 476, 484).

The negation of the *Hicklin* test expressed in the phrases "average person" and "contemporary community standards" does not mean that the rights guaranteed by the First Amendment are to be determined by conducting a Gallup poll among the population at large. The phrases were not meant to limit writers and publishers to the average person's conception of the kind of writing that ought to be published, or to limit a minority of readers to the kind of reading that a majority might think good for them. Where a statute purports to control general publication, the reference to "the average person" excludes as criteria the possible responses and attitudes of special elements of the population. (A less intrusive statute, which might, for example, regulate sales to children, is to be distinguished from a statute that suppresses publication altogether.) The reference to "contemporary community standards" fixes attention on the historic fact that standards change. The Court was not seeking to chain creative minds to the dead center of convention at a given moment in time.

It is thus the kind of appeal which the work has for the normal adult that is involved, and for purposes of the test the appeal must be one that will excite morbid and unwhole-

some interest. (Modern psychology confirms what observers of human nature have long known: that the average person includes, in the spectrum of responses of which he is capable, responses that are morbid and unwholesome.) Stimulation of a normal sexual response is not enough.

It could not, on any rational view of things, be enough. If the construction of the prurient interest test were otherwise—if a work's predominant appeal to a normal sexual interest were crucial—much of the greatest traditional art would fail the test. Consider the man of average sensuality, and average education in the visual arts. What, for him, is the predominant appeal of the works, say, of Rodin? Will he admire what the cultivated student of art finds to admire (*inter alia*) in the sculpture?[8] Or will he admire, and be stirred by, the woman he sees in the bronze?[9] Contemporary painting and sculpture would be less likely to fail the test—since bewilderment is likely to prevail over desire, if desire is at all involved—but the response of the average man to traditional art will often be predominantly, if not exclusively, a sexual response.

The tests of *Roth* and *Alberts* were applied in the case involving *Lady Chatterley's Lover (Grove Press* v. *Christenberry,* 175 F. Supp. 488 (S. D. N. Y.), aff'd 276 F. 2d 433 (2 Cir.)). The sexual passages in *Lady Chatterley's Lover* may fairly be said to be more stimulating than those in the present book. Certainly they speak more directly to twentieth-century readers. From this point in time, *Memoirs* may seem more quaint than lustful, and *Lady Chatterley's Lover* has an immediate impact that can hardly be found in the erotic minuets performed by Cleland's eighteen-century characters. Moreover, the forbid-

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[8] *Inter alia,* because the student of art may himself be assumed to be a man of normal sexual instincts. See Sir Kenneth Clark, 1953 Lectures at the National Gallery of Art, reprinted in Clark, *The Nude* (Doubleday Anchor 1959), especially page 29.

[9] For example: *The Metamorphoses of Ovid; The Eternal Idol.* Or in marble: *Danaïd; The Kiss.*

den words are used in *Lady Chatterley's Lover*. Nevertheless, the District Court and all three judges of the Circuit Court of Appeals found the book not obscene under *Roth* and *Alberts*.

With respect to contemporary community standards and customary limits of candor, the record contains both testimony and documentary evidence (R. 25-26, 39-40, 65, Exhibits B-I (not printed)). They show that *Memoirs* does not go beyond the limits of writing that is today reputably published and commonly accepted. It is not necessary to compare *Memoirs* with the obvious trash that we see on our newsstands. Our most popular magazines—publications that no one would think to condemn as prurient—all contain material, in pictures and in text, that arouse sexual impulses. Nor do we suggest that because one publication is sold without prosecution, another necessarily may be. The point rather is that the publication by reputable publishers of works that deal with sex in a given degree of candor, and their acceptance by the general reading public, establish community standards for reading materials.

The newspaper clippings and the magazine that are in evidence illustrate the broad range of public tolerance toward what they read. Newspapers and magazines, at about the time of the publication of the book in question, gave the public daily descriptions of the prostitution, orgies, lesbianism, voyeurism, flagellation and other sexual excesses that were disclosed in the Profumo affair. It can hardly be maintained that what may be presented as present-day fact to the entire public may not be presented as two-hundred-year-old fiction to the book-buying portion of the public.[10]

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[10] The illustrations in the exhibits add a dimension that the book in question lacks. It is reasonable to assume that the women pictured, in the eyes of the average man, are physically appealing. The full-color photographs of Christine Keeler that appear in the copy of Life magazine, for example, are hardly calculated to make sin unattractive.

Memoirs, of course, has erotic interest. It is a book about sex. But the interest of its heroine-narrator in sex is not "shameful or morbid". Neither is the interest of the normal adult reader of the book (R. 25-26, 28-30, 31-32, 33-35, 37-40, 92-93). Fanny Hill's attitude toward sex is honest and essentially innocent, not leering or dirty. There is none of the solipsism that is characteristic of the trashy sex novel; Fanny is keenly aware of, and tells us about, the personalities and characters of the human beings that she encounters. Her appreciation of sex is natural, not sick or perverted. Aberration is rejected and denounced. The book is directed toward life, not toward morbidity.[11]

The majority's discussion of its application of the prurient interest test to *Memoirs* is, in its entirety, as follows:

> "We have no doubt that the dominant theme of Memoirs appeals to prurient interest. The book is composed almost entirely of a series of episodes involving Lesbianism, voyeurism, prostitution, flagellation, sexual orgies, masturbation, fellatio, homosexuality, and defloration, all of which 'goes substantially beyond customary limits of candor in describing or representing such matters.' " (206 N. E. 2d 403, 405; R. 122.)

From the catalog of episodes one may perhaps infer that it is the presence of aberrations that influenced the court.[12] We submit that the itemization does not constitute an accurate description of the book. The principal sexual interest of *Memoirs* is a normal heterosexual interest, and,

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[11] The statement of the prevailing opinion of the Court of Appeals of Ontario, in holding *Memoirs* not obscene, is pertinent:

> "In my opinion, the book, read as a whole, has not about it that aura of morbidity nor that degree of suggestive pruriency which might render it obscene within the meaning of the Code." (*Queen* v. *S. Coles Co. Ltd.,* 44 Crim. Rep. 219.)

[12] It may be noted that the court's list is very similar to the summary above of the items contained in the Profumo newspaper reports.

as the witnesses pointed out, Fanny Hill extols the normal sexual relationship and scorns the deviant. Moreover, it is fundamental that no subject matter as such is excluded from the First Amendment guaranties; there is no thematic obscenity. See *Roth* v. *United States,* 354 U. S. 476, 487.

Possibly the crucial words in the quoted statement are "almost entirely". They suggest that the majority below based its conclusion on the amount of sexual material in *Memoirs.* But surely the extent to which a book deals with sex cannot determine the application of the test. One radical décolletage in a group chastely costumed will create more sexual excitement than a beachful of bikinis. If there is not that quality of essential nastiness and morbidity which identifies appeal to prurient interest, the quantity of sexual material in a book will not create it. Prurience is not a matter of arithmetic.

Earlier in its opinion, the majority below had stated: "The fact that Memoirs may arouse sexual thoughts and desires is not, in itself, sufficient to deprive it of its constitutional protection" (206 N. E. 2d 403, 404; R. 121). The statement is unexceptionable, but the opinion does not otherwise make a case for condemnation under the prurient interest test. With all the respect due a distinguished court, it would seem that, despite the disclaimer, the majority found *Memoirs* prurient because it found *Memoirs* erotic. But whatever the reasoning behind the majority's elliptical statement, the conclusion that it reached necessarily involves a departure from the prurient interest test as this Court has formulated and applied it.

3. Memoirs is entitled to constitutional protection under the patent offensiveness test.

The term "patent offensiveness" is given definition by the facts of the case in which it first appeared. Apart from the effect of the *Manual Enterprises* publications upon those "unfortunate persons whose patronage they were aimed at capturing" (370 U. S. 478, 490), it is apparent

from the descriptions of the publications (370 U. S. 478, 489-490, 526-527) that most adults would, as the Court did, recognize them for what they are. "Patent offensiveness", then, necessarily means something quite beyond a violation of standards of propriety or good taste. Not everything that the average person finds offensive can be called "patently offensive" within the meaning of *Manual Enterprises*. But, even if we were considering standards of taste rather than standards of constitutional law, Fanny Hill would do well:

> ". . . she never utters an obscene word, rarely descends even to colloquialism, never to the clinical; she indeed writes an elaborate literary language that would do credit to any master of baroque and poetic utterance—shall we say Henry James?—spoken in a drawing room. And it is not shabby baroque." (Pritchett, R. 28.)
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> "One is not unaware of the formal values of the work. I think that one's response is, in part, or, as it is in any work of art, both to what is being said and how it is said at the same time. Very often, I think that this is a saving grace, for many of the scenes, translated into language of the present, realistic, naturalistic, in the language of the realistic, naturalistic novel, could be quite offensive. But I find it not offensive." (Sproat, R. 65.)
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> ". . . in an age when even serious authors treat the sexual act in terms of a case history or social protest (and the Olympia Press's professional pornographers are driven to exploit De Sadean whips, chains and intricate multiple interlacings to keep ahead of the uncensored press), Fanny Hill's straightforward heterosexuality must come as a shock. None of her escapades, for instance, are as unsavory as the AC-DC boy-meets-boy encounters of James Baldwin's *Another Country,* nor are they as grubbily explicit as the climactic sexual passage in Updike's *Rabbit Run.*
>
> "Certainly Fanny was no common harlot. Her 'Memoirs' combine literary grace with a disarming

> enthusiasm for an activity which is, after all, only human. What is more she never uses a dirty word." (*Time,* R. 40.)
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> "Mercifully *not* 'robust', or Rowlandsonian, [Cleland] is decorous not merely in vocabulary but down to the last cadence of his fine, plain prose." (Brophy, R. 37-41.)
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> "Cleland was not a great writer, but he was a gifted one, and in my belief as much entitled to call himself an artist as Henry Miller. The chief difference between them is that Cleland presented normal sexual relations for what they are—the intensest pleasure man derives from his senses; Miller makes them revolting. I would prefer to have a child of mine read Cleland than Miller." (Adams, R. 25.)

Elegance is the antonym of offensiveness, and the evidence of the witnesses and the documents confirms what is apparent from a reading of the novel—the absence of the gross, the presence of elegance. It is no answer to say that the underlying subject matter may be offensive to some; it is offensiveness on the face of the material that this test speaks of, and the underlying subject matter in *Manual Enterprises* must be kept in mind when the opinion in that case is applied.

"Patent offensiveness" may perhaps be found in a work such as *Tropic of Cancer,* a work entitled to protection for other reasons. But the term cannot appropriately be applied to *Memoirs.* Certainly erotic in subject matter, it is just as certainly, in its patent qualities, free from the extreme offensiveness that *Manual Enterprises* contemplates.

4. MEMOIRS IS ENTITLED TO CONSTITUTIONAL PROTECTION UNDER THE SOCIAL VALUE TEST.

In *Roth* and *Alberts* the statutes were attacked as unconstitutional *in toto* and there was no other issue. The majority accordingly undertook a comprehensive statement of the reasons why the First Amendment does not

protect obscene material, and this necessarily entailed a description of just what this unprotected material is.

The majority held that it has two characteristics. One is appeal to prurient interest, discussed above. The other is the complete absence of social importance. It is not every worthless publication, of course, that the statutes can affect; it must be a publication that appeals to prurient interest. Nor is it every publication considered prurient that the statutes can affect; it must be a publication "utterly without redeeming social importance." For unless the publication is worthless trash, it is not possible to justify its suppression in the face of a Constitution that forbids abridgement of freedom of the press.

Laws affecting speech or writing have, of course, been held to have a valid operation in spite of the First Amendment guaranties. The *Roth* and *Alberts* opinion mentioned cases that had so held. They are cases in which the speech or writing amounted to conduct rather than expression, or was so entwined with conduct that the behavioral rather than the expressive aspect dominated.[13] Prohibitory laws might also operate where material is so utterly devoid of value that it need not be regarded as speech or writing at all.

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[13] *United States* v. *Harriss*, 347 U. S. 612 (disclosure provisions of the Federal Lobbying Act); *Breard* v. *Alexandria*, 341 U. S. 622 (municipal ordinance prohibiting peddlers from calling upon private residences without invitation); *Teamsters Union* v. *Hanke*, 339 U. S. 470 (state court injunction against picketing); *Kovacs* v. *Cooper*, 336 U. S. 77 (municipal ordinance against sound trucks emitting "loud and raucous noises"); *Prince* v. *Massachusetts*, 321 U. S. 158 (state statute prohibiting newspaper sale on the streets by minors); *Labor Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469 (coercion by employer under National Labor Relations Act; ". . . conduct, though evidenced in part by speech, may amount, in connection with other circumstances, to coercion within the meaning of the Act" (p. 477)); *Cox* v. *New Hampshire*, 312 U. S. 569 (state statute requiring a license for parade); *Schenck* v. *United States*, 249 U. S. 47 (the "clear and present danger" test applied to a conspiracy to circulate materials influencing persons to obstruct a wartime draft). 354 U. S. 476, 484.

This last category provided both the constitutional justification for anti-obscenity legislation and, within the area bounded by the line of prurient interest, the constitutional definition of obscenity. Anti-obscenity statutes, the majority held, have a discernible, though severely limited, validity. Legislatures, in the pursuit of goals relating to prevailing concepts of immorality or offensiveness, may ordain suppression despite the strong language in which the First Amendment is cast. But they may do this only with respect to material that has no social value, and only because it has no social value.

The First Amendment, of course, has its principal function where the majority disapproves. Where a work of any value is in issue, the fact that most of the citizenry views it as immoral or offensive cannot justify a forcible silencing. On the other hand, it may be said of material utterly without value that it does not rise to the level of writing—that is, "the press"—within the meaning of the Constitution. Once obscenity is defined as that which has no value, then—and only then—room can be found in our constitutional structure for anti-obscenity legislation. The mark of suppressible obscenity inheres in the constitutional justification of the suppressive legislation.

The social value test supplied not only doctrinal validity but practical workability. The prurient interest test was itself a significant step toward clarity. The elimination of the spectacular weaknesses of *Hicklin* represented an important gain, and the word "prurient" provided some content and character where earlier formulas provided only amorphous deprecation. But the prurient interest test, standing alone, left the law to deal with these grave yet delicate questions in terms of judicial responses that must remain largely subjective.

The determination of whether the predominant appeal of a book is to prurient interest is a matter of direct and personal reaction. Evidence of contemporary community standards and customary limits of candor can give the

court a background against which to make its judgment, but there is no further aid to decision. No witness is an expert here, except with respect to that background, and any opinion he might offer as to the presence or absence of prurient interest would be a legal conclusion. There is the challenged book, and the key word, and the court must decide whether they match or do not match; there is nothing in between.

Social value, on the other hand, provides a criterion that can be objectively applied, and by a process familiar to the law. Judges and jurors are no longer committed to a total reliance on their individual responses. Traditional judicial techniques come into play. There is evidence to be considered.

We are now on familiar judicial ground. The courts have long dealt with questions of value, and there are time-tested methods at hand. One method by which value may be shown is in the testimony of those who may be qualified as expert in the field. Real estate experts, for example, give testimony in condemnation cases and in tax cases, and security analysts estimate earning power in corporate reorganization cases. Similarly, those who are qualified to speak about the particular values that a book is alleged to have can offer the court expert testimony on the point. There are among us individuals who, by training and experience, are better qualified than most to appraise the literary or artistic or other merit of a book. Their opinion testimony provides the material of decision.

Opinion as to value is quite different from opinion as to whether a book is prurient or not prurient, or obscene or not obscene; these words signal conclusions of law, which are the business of the court, not of the witness. Nor is the witness asked to state whether the book has that value which brings it within the protection of the First Amendment. The determination of that question is the province of the court, and the witness has only his usual function of supplying evidence upon which the court will act.

Another source of objective evidence as to value is documentary. Where there are book reviews, or critical essays, additional data can be presented to the court. The situation is analogous to those in which there are indications of value apart from the litigation, in the form of appraisals or otherwise, where economic value is in issue. There is this difference: where literary or scientific or artistic value is concerned, it is not alone the content, but the very existence of independent and respectable appraisals, that is meaningful. Writing which is "utterly without social importance" does not become the subject of sober critical consideration. There naturally will be differences of opinion about any given work, but the fact that there is serious discussion of the work, by recognized critics and scholars, published in established periodicals, is an objective fact of the utmost significance.

That the presence of value entitles a book to the protection of the First Amendment has been the law, we submit, since the date of *Roth* and *Alberts*. Most high state courts that considered the matter agreed, even before *Jacobellis* and *Grove Press* v. *Gerstein,* and those cases confirmed the proposition.[14]

In the present case there are both kinds of evidence. Respected critics have written about the book, and what they wrote is part of the record. In addition, there appeared in court, to face whatever rigors cross-examination might produce, distinguished faculty members from the colleges and universities of the Commonwealth of Massachusetts. Some assign the book a high place in the echelons of literature. Thus Pritchett feels that Cleland succeeded where D. H. Lawrence failed (R. 31). Holland ranks *Memoirs,* among eighteen-century novels, above Defoe's celebrated *Moll Flanders* (R. 72). Others do not rate the book so highly. But all of the witnesses and all of the documentary evidence agree upon the fundamental point: *Memoirs* is

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[14] See cases cited page 8 above.

a work of literature that has considerable value.[15] Its value is not confined to the excellence of the writing—although good writing is rare enough to make its suppression an act of social improvidence. Nor is it confined to other purely literary features, such as wit, structure, and characterization. *Memoirs* has, in addition, a notable degree of psychological insight, and ideas about manners and morals that are entitled to reflective consideration. Moreover, the book has historical significance, both for what it tells about the society of its time, and for the place that it occupies in the development of the novel.[16]

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[15] Even opposing counsel were impressed with the merits of the book. The Attorney General's brief to the Supreme Judicial Court stated (at pages 6 and 7) that the writing in *Memoirs* is "quite clever"; that there is "frequent use of highly colorful metaphor"; that there is no reason to disagree with the expert testimony to the effect that "the writing style is artistic"; and, in a sentence instinct with admiration, that there is "a comic flair to the writing that is inescapable". Contrast the statement of Chief Judge Desmond of the New York Court of Appeals on *Tropic of Cancer*. ". . . Not only is there in it no word or suggestion of the romantic, sentimental, poetic or spiritual aspects of the sex relation, but it is not even bawdy sex or comic sex or sex described with vulgar good humor. . . ." (*People* v. *Fritch*, 13 N. Y. 2d 119, 126, 192 N. E. 2d 713, 718.)

[16] The Attorney General produced one witness in opposition. His opinions were not so much literary evaluations as legal conclusions. His concepts, moreover, differed from those of the courts; he stated that *Tropic of Cancer* is obscene (R. 19). His misuse of language, in view of his educational background, suggested an emotional commitment inconsistent with the requisite detachment of an expert witness. When asked what he understood by the word "prurient", he used the word "esoteric"; when asked whether that was the word he meant, he answered "Yes" (R. 16). He indicated that the word "disgusting" could be applied to no books other than those that have a sexual subject matter (R. 18). Further doubt is cast on his competence as a literary expert by his listing Jane Austen as an eighteenth-century novelist (R. 16). (*Sense and Sensibility* was published in 1811, *Pride and Prejudice* in 1813, and *Emma* in 1816.) Finally, he could not recall important aspects

(Footnote continued on next page)

The majority below gave the criterion of social importance only grudging acceptance, referring to it as "one other possible test" (206 N. E. 2d 403, 405; R. 123)—this despite the explicit affirmation of the test by the same court in *Attorney General* v. *Tropic of Cancer*.[17] It was perhaps a reluctance to concede the test's existence that led the majority below to falter in its application. There was plain error on the constitutional fact of the value to be found in *Memoirs*: the majority ascribed to the book only "some minimal literary value" (206 N. E. 2d 403, 406; R. 124). A publication might have considerably less value than the testimony and the documentary evidence show *Memoirs* to have and still rise above the level of "minimal literary value".

The majority below stated that the test does not require that a book "must be unqualifiedly worthless before it can be deemed obscene" (206 N. E. 2d 403, 406; R. 124). There is a question whether this can be reconciled with the principle that the obscene, in a constitutional sense, is only that which is "utterly without redeeming social importance", but the question is one that need not be reached. The considerable evidence of value in *Memoirs* renders *obiter* any exploration of the outer reaches of what the social value test protects. The present case does not involve any iota or scintilla theory of social importance.

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and events of the book about which he was testifying (R. 21). Although he said that he had read it on the night before the trial (R. 19), he could not remember who it was that Fanny Hill married (R. 21), despite the fact that the initial separation and ultimate reunion of Fanny and Charles is a central theme in the novel. Either this is a memory lapse that again bespeaks involvement rather than objectivity, or it is evidence that the witness had not read the whole book.

[17] ". . . We think, in the light of the decisions reviewed above, that the First Amendment protects material which has value because of ideas, news, or artistic, literary, or scientific attributes. . . ." (345 Mass. 11, 19, 184 N. E. 2d 328, 333).

Nor does it involve a situation where evidence *pro* and *contra* must be weighed. The testimony of the Attorney General's one witness (R. 10-21), described above at pages 4 and 24-25 (footnote 16), cannot reasonably be said to create a conflict with the evidence going to show the value of the book.

The opinion below mentions, in slighting, advocates' tones, that the book "contains a moral" (206 N. E. 2d 403, 406; R. 124). But the critics treated Fanny's thoughts about life and love as seriously meant, and entitled to serious reading. Pritchett puts it this way: "She is unrepentant in pleasure or lust; but she truthfully perceives —and that, I believe, without the sort of hypocrisy that greater writers like Defoe or Richardson insinuated—that she had physical pleasure in lust but physical, spiritual pleasure in love" (R. 28). Similarly, Brophy finds Fanny's final statement to be "without, as she rightly claims, hypocrisy. . . ." (R. 36). The witnesses gave more detailed testimony to the same general effect—that the observations, ideas and moral conclusions of the book are thoughtful, substantial and perceptive (R. 42-43, 45, 46, 55, 64, 67, 87-88, 92-93).

Referring to the expert testimony, the majority said, in passing "much of [it] was strained" (206 N. E. 2d 403, 406; R. 124). We respectfully but emphatically disagree. The testimony was careful and specific. The witnesses were not indulging in flights of critical fancy. What they had to say made sense on direct examination, and continued to make sense under persistent cross-examination. The witnesses are men of high academic standing, who would be most unlikely to jeopardize that standing by giving sworn testimony that might return to embarrass them. It is one thing to assert that a book is "not obscene" or "not pornographic". These are conclusory statements that can always be defended on semantic grounds. It is quite another thing for a professional critic or teacher to analyze a book, to give detailed testimony about what values he sees in it, and to appraise the book in relation to other works of litera-

ture. Even if a single individual might conceivably be so irrational as to do what the majority below suggests, it is not conceivable that the entire roster of these distinguished men should be willing to give disingenuous, distorted or otherwise "strained" testimony.[18]

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[18] Although it is not part of this record, we invite the Court's attention to matters of record in the two other cases in which the Publisher defended *Memoirs (Larkin* v. *G. P. Putnam's Sons,* N. Y. Co. Clerk's Index No. 41231-63, Supreme Court, New York County, August, 1963; *G. P. Putnam's Sons* v. *Calissi,* Docket No. C-3070-62, Superior Court of New Jersey, Chancery Division, Bergen County, June, 1964). Only three of the witnesses (excluding the Publisher's president) appeared at more than one of the three trials. The following testified in the New York and New Jersey trials: J. Donald Adams, for many years editor-in-chief of *The New York Times Sunday Book Review;* Eric Bentley, critic, dramatist and Professor of Dramatic Literature at Columbia; Louis Untermeyer, poet, critic and anthologist; Eliot Fremont-Smith, book review editor and regular critic for *The New York Times;* Clarence Decker, Professor of Literature and Vice-President at Fairleigh Dickinson; John McCormick, Chairman of the Department of Comparative Literature at Rutgers; John Hollander, Assistant Professor of English at Yale; Gerald Willen, Assistant Professor of English at Hunter College; Paul Fussell, Associate Professor of English and Director of English Graduate Studies at Rutgers; and David Burrows, Assistant Professor of English at Douglas College For Women.

In the one case that involved a motion for preliminary injunction *(Larkin* v. *G. P. Putnam's Sons),* the following submitted affidavits or letters attesting the merit of the work: the critics Alfred Kazin, Maxwell Geismar, Dwight MacDonald and Edward B. Garside, John Gassner, Sterling Professor at Yale, Barbara Epstein, co-editor of *The New York Review of Books,* and Norman Podhoretz, editor-in-chief of *Commentary* magazine.

It thus appears that in each locality where the book was called into question there were numbers of highly qualified critics and scholars who regarded the book as one of substantial value, and were willing to say so, under oath, in court. If they represented only a minority of critical opinion, it is strange that no member of the hypothetical majority (with the dubious exception of Dr. Collins) would have appeared to give contrary testimony at any of the three trials. And even if they represented only a minority, the existence of a minority of such substance, holding such views, would establish the social importance of the book.

Moreover, there was corroboration for what the witnesses said in the published essays of Pritchett, Adams and Brophy, and in the introduction by Peter Quennell. Celebrated critics thus submitted to the judgment of the literary world opinions very similar to those which the witnesses submitted to the judgment of the court. It is not realistic to suppose that when V. S. Pritchett writes that *Memoirs*

> "has its place in the history of literature, not in the history of smut" (R. 28),

or when he writes that

> "Cleland is good about sex because he is good about words. Elegance, energy, and kindness he conveyed." (R. 31).

he does not mean what he says. Nor is it realistic to suppose that any other of the witnesses or writers was offering an unprofessional opinion, one that might diminish his reputation as scholar or critic.

5. THE HARD-CORE PORNOGRAPHY TEST LEADS TO THE SAME RESULT.

If "hard-core pornography" is taken as the definition of what may be constitutionally suppressed under anti-obscenity legislation, the result in the present case is the same. Analytically, the concept appears to involve all three standards discussed above. It would seem to be a combination of morbidity, extreme offensiveness and utter worthlessness that denotes hard-core pornography. No such syndrome can be attributed to *Memoirs.* If the concept is considered not analytically but empirically, there is a striking contrast between *Memoirs* and publications that have been held to be obscene: see *People* v. *Finkelstein,* 11 N. Y. 2d 300, 183 N. E. 2d 661, cert. den. 371 U. S. 863; *Burke* v. *Kingsley Books, Inc.,* 208 Misc. 150, 142 N. Y. S. 2d 735, affd. (on another issue) *sub nom. Kingsley Books, Inc.* v. *Brown,* 354 U. S. 436; *People* v. *Sikora,* 32 Ill. 2d 260, 204 N. E. 2d 768. And comparison with publications held not obscene

appears to exclude the possibility that *Memoirs* might be deemed hard-core pornography; we refer to the various materials in the *per curiam* reversals that followed *Roth*, to the contents of the magazine in *People* v. *Richmond County News, Inc.*, 9 N. Y. 2d 578, 175 N. E. 2d 681 (see the description at 9 N. Y. 2d 578, 594), to the illustrated perversions of *United States* v. *Klaw*, 350 F. 2d 155 (2 Cir.), and to the rough and shocking *Tropic of Cancer* of *Grove Press* v. *Gerstein*, 378 U. S. 577.

6. BOOKS HAVE A SPECIAL PLACE AMONG THE FORMS OF EXPRESSION PROTECTED BY THE FIRST AMENDMENT AGAINST SUPPRESSION UNDER ANTI-OBSCENITY STATUTES.

It has, of course, been held that the guaranties of freedom of speech and of the press go beyond vocal utterance and the printed word. It does not follow, however, that the guaranties are to be applied in the same way, or to the same extent, with respect to all forms of expression. See *Freedman* v. *Maryland*, 380 U. S. 51, 60-61. Books have a certain primacy because of their importance to society. Moreover, such conflicts as there may be with interests sought to be served by anti-obscenity legislation are less intense where books are concerned.

The audience for a book is the individual reader, not an assembled group. In a theatre audience, for example, there is a simultaneous collective experience, and the social interaction itself creates problems.[19] Again, the reader of a book has instant control over his exposure to it; he can terminate the experience by closing the book, and if its reputation puts him off, he need not open it. In contrast, other means of communication—the sound truck, for example, or the advertising poster in a train or bus—make us their captive. Television, the great new medium of our time, presents both aspects: its communications are usually re-

[19] The familiar hypothetical from another area of restraint—shouting "Fire!" in a theatre—would hardly present a problem if there were only one other person in the theatre.

ceived in a social situation, and contact is not always easily broken off. (Typically, television-viewing is a family affair, and it takes a family consensus to end it.) Finally, forms of expression differ in their impact. Scenes described in commonly accepted books would, if performed by actors on a stage, or displayed in photographs on a billboard, become quite different in their effect. Unlike forms of expression that make direct appeal to the senses, a book's communications must pass through the screen of the intellect.

There is no important channel of communication that is more private and more a matter of individual control than a book. There is none that is less inflammatory (except in the unassailable realm of ideas) or less involved with public decorum. Hence the possibilities of antagonism between the publishing of books and other interests of society are relatively small.

At the same time, books have a singular importance for society. Tradition gives them a special place. It was to liberty of printing that John Milton's *Areopagitica* was addressed, and the great controversies about freedom of expression that were resolved in the adoption of the First Amendment had to do mainly with books (including that predecessor of contemporary paperbacks, the pamphlet).

Books provide a vehicle for the transmission of thought that is not matched by other forms of expression. They communicate ideas not only by way of exposition, but also through the shared experiences and perceptions of poetry and fiction. Other forms of expression may be as good or better for entertainment, excitement, or provoking emotional response, but the printed word remains the most important medium for the communication between mind and mind on which our civilization rests.

Any exercise of governmental power that hampers the free circulation of books therefore threatens our society. Even where printed matter upon trial is shown to be utter trash, and may properly be called a book only because there

are pages and ink and a cover, the use of the law to suppress it raises grave questions. The decisions of the Court leave room for the suppression of such material. But they leave no room whatever for the suppression of a book which, upon trial, is shown to have value—"literary or scientific or artistic". The contrary proposition, we submit, toys in a frightening way with the fundamentals of our government. If the concept of freedom of the press is not to be qualified beyond recognition, it must mean that, in a case where value is proven, a book may not be destroyed. That is the case before the Court.

Conclusion

The judgment below should be reversed.

Respectfully submitted,

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UNITED STATES CONSTITUTION, AMENDMENT I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION, AMENDMENT XIV, SECTION 1.

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MASSACHUSETTS GENERAL LAWS, CHAPTER 272.

* * *

SECTION 28B. Whoever imports, prints, publishes, sells, loans or distributes, or buys, procures, receives, or has in his possession for the purpose of sale, loan or distribution, a book, knowing it to be obscene, indecent or impure, or whoever, being a wholesale distributor, a jobber, or publisher sends or delivers to a retail storekeeper a book, pamphlet, magazine or other form of printed or written material, knowing it to be obscene, indecent or impure, which said storekeeper had not previously ordered in writing, specifying the title and quantity of such publication he desired, shall be punished by imprisonment in the state prison for not more than five years or in a jail or house of correction for not more than two and one half years, or by a fine of not less than one hundred dollars nor more than five thousand dollars, or by both such fine and imprisonment in jail or the house of correction. [As amended by St. 1960, c. 311.]

SECTION 28C. Whenever there is reasonable cause to believe that a book which is being imported, sold, loaned or distributed, or is in the possession of any person who intends to import, sell, loan or distribute the same, is obscene, indecent or impure, the attorney general, or any district attorney within his district, shall bring an information or petition in equity in the superior court directed against said book by name. Upon the filing of such information or petition in equity, a justice of the superior court shall, if, upon a summary examination of the book, he is of opinion that there is reasonable cause to believe that such book is obscene, indecent or impure, issue an order of notice, returnable in or within thirty days, directed against such book by name and addressed to all persons interested in the publication, sale, loan or distribution thereof, to show cause why said book should not be judicially determined to be obscene, indecent or impure. Notice of such order shall be given by publication once each week for two successive weeks in a daily newspaper published in the city of Boston and, if such information or petition be filed in any county other than Suffolk county, then by publication also in a daily newspaper published in such other county. A copy of such order of notice shall be sent by registered mail to the publisher of said book, to the person holding the copyrights, and to the author, in case the names of any such persons appear upon said book, fourteen days at least before the return day of such order of notice. After the issuance of an order of notice under the provisions of this section, the court shall, on motion of the attorney general or district attorney, make an interlocutory finding and adjudication that said book is obscene, indecent or impure, which finding and adjudication shall be of the same force and effect as the final finding and adjudication provided in section twenty-eight E or section twenty-eight F, but only until such final finding and adjudication is made or until further order of the court. [As inserted by St. 1945, c. 278, § 1.]

SECTION 28D. Any person interested in the sale, loan or distribution of said book may appear and file an answer on or before the return day named in said notice or within such further time as the court may allow, and may claim a right to trial by jury on the issue whether said book is obscene, indecent or impure. [As inserted by St. 1945, c. 278, § 1.]

SECTION 28E. If no person appears and answers within the time allowed, the court may at once upon motion of the petitioner, or of its own motion, no reason to the contrary appearing, order a general default and if the court finds that the book is obscene, indecent or impure, may make an adjudication against the book that the same is obscene, indecent and impure. [As inserted by St. 1945, c. 278, § 1.]

SECTION 28F. If an appearance is entered and answer filed, the case shall be set down for speedy hearing, but a default and order shall first be entered against all persons who have not appeared and answered, in the manner provided in section twenty-eight E. Such hearing shall be conducted in accordance with the usual course of proceedings in equity including all rights of exception and appeal. At such hearing the court may receive the testimony of experts and may receive evidence as to the literary, cultural or education character of said book and as to the manner and form of its publication, advertisement, and distribution. Upon such hearing, the court may make an adjudication in the manner provided in said section twenty-eight E. [As inserted by St. 1945, c. 278, § 1.]

SECTION 28G. An information or petition in equity under the provisions of section twenty-eight C shall not be open to objection on the ground that a mere judgment, order or decree is sought thereby and that no relief is or could be claimed thereunder on the issue of the defendant's knowledge as to the obscenity, indecency or impurity of the book. [As inserted by St. 1945, c. 278, § 1.]

SECTION 28H. In any trial under section twenty-eight B on an indictment found or a complaint made for any offence committed after the filing of a proceeding under section twenty-eight C, the fact of such filing and the action of the court or jury thereon, if any, shall be admissible in evidence. If prior to the said offence a final decree had been entered against the book, the defendant, if the book be obscene, indecent or impure, shall be conclusively presumed to have known said book to be obscene, indecent or impure, or if said decree had been in favor of the book he shall be conclusively presumed not to have known said book to be obscene, indecent or impure, or if no final decree had been entered but a proceeding had been filed prior to said offence, the defendant shall be conclusively presumed to have had knowledge of the contents of said book. [As inserted by St. 1945, c. 278 § 1.]

Table of Contents.

Statement of the case 1

Summary of argument 3

Argument 4

I. John Cleland's "Memoirs" is utterly without that redeeming social importance which would entitle the book to protection by the First Amendment to the Constitution of the United States 4

II. The average person, applying contemporary community standards, will find that the dominant theme of the material taken as a whole appeals to prurient interest; accordingly, the book in question is not entitled to the protection of the guaranties of the First Amendment under the so-called "prurient interest" test 10

III. The book in question is not entitled to the protection of the First Amendment guaranties, because it is "patently offensive" in the sense in which that expression is used in the case of Manual Enterprises, Inc., v. Day 15

IV. The standards set forth by the United States Supreme Court in Roth and Manual Enterprises have not been altered; fair application of such standards requires that "Memoirs" be adjudged to be obscene and not entitled to the protection of the guaranties of the First Amendment 17

Conclusion 22

Table of Authorities Cited.

CASES.

Alberts v. California, 354 U.S. 476 4, 20

Attorney General v. A Book Named "John Cleland's Memoirs of a Woman of Pleasure," 1965 Mass. Adv. Sh. 635 2

Attorney General v. The Book Named "Tropic of Cancer," 345 Mass. 11 20, 21
Grove Press, Inc., v. Gerstein, 378 U.S. 577 20
Jacobellis v. Ohio, 378 U.S. 184 6, 19
Larkin v. G. P. Putnam's Sons, 14 N.Y. 2d 399, 200 N.E. 2d 760 21
Manual Enterprises, Inc., v. Day, 370 U.S. 478 4, 15, 16, 17, 18, 21, 23
Mounce v. United States, 355 U.S. 180 (revg. 247 F. 2d 148) 18n.
One, Inc., v. Olesen, 355 U.S. 371 (revg. 241 F. 2d 772) 18n.
Quantity of Copies of Books, A, v. Kansas, 378 U.S. 205 19
Regina v. Hicklin, L.R. 3 Q.B. 360 11
Roth v. United States, 354 U.S. 476 3, 4, 5, 9, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 23
Sunshine Book Co. v. Summerfield, 355 U.S. 372 (revg. 249 F. 2d 114) 18n.
Times Film Corp. v. Chicago, 355 U.S. 35 (revg. 244 F. 2d 432) 18n.

STATUTES, ETC.

Constitution of the United States, First Amendment 2, 3, 4, 5, 10, 15, 17, 18, 20, 21, 22, 23
Constitution of the United States, Fourteenth Amendment 2

G.L. c. 272
§ 28C 1, 2
§ 28E 2
§ 28F 2

Supreme Court of the United States.

OCTOBER TERM, 1965.

No. 368.

A BOOK NAMED "JOHN CLELAND'S MEMOIRS OF A WOMAN OF PLEASURE,"
G. P. PUTNAM'S SONS (INTERVENOR), *Appellant*,
v.
ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, *Appellee*.

BRIEF FOR APPELLEE.

Statement of the Case.

The case was begun by the filing of a petition by Edward W. Brooke, Attorney General of the Commonwealth of Massachusetts (hereinafter called "the Attorney General"), pursuant to G.L. c. 272, § 28C, as amended (R. 1-2). The said petition represented that the book entitled *John Cleland's Memoirs of a Woman of Pleasure* (commonly known as *Fanny Hill*) (hereinafter called "*Memoirs*") was at that time being imported, sold, loaned or distributed in the Commonwealth; that the author thereof was John Cleland; and that the publisher and copyright holder was G. P. Putnam's Sons of the City of New York. The petition sought entry of a final decree adjudging the said book to be obscene, indecent and impure (R. 1-2).

On the same day, a Justice of the Superior Court indicated that a summary examination of the book in question

established that there was reasonable cause to believe that the book was obscene, indecent and impure, and—in accordance with chapter 272, § 28C—issued an order of notice directed against the book (R. 2-5). On motion by the Attorney General filed pursuant to the same section, an interlocutory finding and adjudication that the book was obscene, indecent and impure was entered (R. 5).

G. P. Putnam's Sons of the City of New York, the publisher and copyright holder (hereinafter called "the publisher"), intervened on behalf of the book and filed an answer, which answer asserted that the book in dispute was protected by the First and Fourteenth Amendments to the Constitution of the United States (R. 6-7). Trial by jury not having been claimed by the publisher, the matter was heard by a Justice of the Superior Court. The book was placed in evidence, and expert witnesses testified. The evidence was reported to the Supreme Judicial Court (R. 7-100). The trial judge issued findings of fact, rulings of law and an order for final decree (R. 100-117). A final decree adjudging the book in question to be obscene, indecent and impure under the provisions of chapter 272, §§ 28C, 28E and 28F, and declaring that the book was not entitled to the protection of the First and Fourteenth Amendments to the Constitution of the United States was entered (R. 117-118).

The publisher filed a claim of appeal from the abovementioned final decree of the Superior Court (R. 118). On April 22, 1965, the Supreme Judicial Court affirmed the final decree (R. 130). *Attorney General* v. *A Book Named "John Cleland's Memoirs of a Woman of Pleasure,"* 1965 Mass. Adv. Sh. 635 (R. 120-129). In accordance with Massachusetts practice, the Superior Court entered a final decree after rescript consistent with the opinion of the Supreme Judicial Court. On June 21, 1965, the publisher filed a notice of appeal to the United States Supreme Court

from both the judgment of the Supreme Judicial Court and the decree entered thereon by the Superior Court (R. 137-140). On November 8, 1965, probable jurisdiction was noted and the case was placed upon the summary calendar (R. 141).

Summary of Argument.

The United States Supreme Court has held, and continues to hold, that material which is obscene is not entitled to the protection of the First Amendment. Although ideas having even the slightest redeeming importance must be protected, obscenity—characterized by its utter worthlessness—may constitutionally be suppressed. Thus each piece of writing must be examined to determine whether such redeeming value is in fact present.

The actions and descriptions of the book before the Court are entirely sex-oriented, without additional material of any kind. Neither the book's style nor the time of its writing is enough to satisfy the "social importance" test of *Roth*. Although expert witnesses introduced by the publisher strained to find value in the writing, a reasonable examination reveals that the book totally lacks any idea or other element which might warrant protection.

The *Roth* case established a second test for obscenity, *i.e.*, whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. *Memoirs* complies with each of the requirements contained in this rule. The average person will view the book as a sex adventure, not simply as an example of eighteenth-century English literature. Contemporary attitudes toward sex may be more liberal than in the past, but it can hardly be said that there is general public acceptance of what appears in this volume. Since the book is virtually the same

from cover to cover, it is a simple matter to consider the work as a whole. *Memoirs* clearly conforms to the definition of an "appeal to prurient interest" developed by the American Law Institute and accepted by this Court.

In the *Manual Enterprises* case the United States Supreme Court added a third test. It was therein stated that writing—in order to be adjudged obscene—must "affront current community standards of decency," a quality which the Court referred to as "patent offensiveness" or "indecency." The sense of propriety and good taste of the average person will be offended by this book. This test looks not to the protection of freedom to dissent but to identification of general attitudes of the national community. Skillful writing alone will not prevent the material from being patently offensive.

Decisions rendered since *Roth* have not changed the approach to obscenity. Fair application of the tests requires that *Memoirs* be held to be obscene. Should the tests never be applied, or should their effect be suspended in individual cases, development of them by the United States Supreme Court could well turn out to have been a vain endeavor. Should this Court rule that *Memoirs* does not meet the tests, it is doubtful that these standards may ever successfully be applied to writing which is in novel form.

Argument.

I. John Cleland's "Memoirs" is Utterly Without that Redeeming Social Importance which would Entitle the Book to Protection by the First Amendment to the Constitution of the United States.

When the issues raised by the companion cases of *Roth* v. *United States,* and *Alberts* v. *California,* 354 U.S. 476, were before the United States Supreme Court in 1957 a

majority of that tribunal rejected as an acceptable alternative the possibility that First Amendment guaranties must be applied absolutely and that accordingly no obscenity legislation whatever could—from a constitutional point of view—be justified. The Court therefore maintained, and has continued to maintain, that certain forms of speech and expression are not entitled to First Amendment protection. In setting forth its position that the First Amendment was not to be considered absolute, the Court indicated that material completely without social or other value would not be protected.

> "All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion —have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. *But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. . . .*" (Emphasis supplied.)
>
> *Roth* v. *United States, supra,* at p. 484.

The Court thus set forth the so-called "social value" test—*i.e.,* that material containing some redeeming features or "social value" must be accorded the guaranties of the First Amendment, but that material utterly lacking such value was beyond the purview of the Amendment and could constitutionally be suppressed.

In a recent treatment of the subject of obscenity the United States Supreme Court reaffirmed its adoption of the "social value" test as a standard to be applied.

> ". . . We would reiterate, however, our recognition in *Roth* that obscenity is excluded from the con-

> stitutional protection only because it is 'utterly without redeeming social importance,' and that 'the portrayal of sex, *e.g.*, in art, literature, and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press.' *Id.*, at 484, 487. It follows that material dealing with sex in a manner that advocates ideas, *Kingsley Int'l Pictures Corp.* v. *Regents*, 360 U. S. 684, or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity and denied the constitutional protection. Nor may the constitutional status of the material be made to turn on a 'weighing' of its social importance against its prurient appeal, for a work cannot be proscribed unless it is 'utterly' without social importance. . . ."
>
> *Jacobellis* v. *Ohio*, 378 U.S. 184, 191.

Consequently, in light of the United States Supreme Court ruling that anti-obscenity statutes may constitutionally be applied to material which is "utterly without redeeming social importance," the book in question must be examined to determine whether the necessary redeeming social importance is present.

John Cleland's Memoirs of a Woman of Pleasure was published in England in the middle of the eighteenth century. Its wide circulation over two hundred years has for obvious reasons been for the most part clandestine. The book is written in the form of two letters from a young lady to an unidentified friend, describing her adventures in and around London. It is not unfair to say that the book is comprised of a series of sexual episodes, most having been participated in by the heroine, some of which she has merely observed. Fanny Hill's progress is traced from her first witnessing of a sexual encounter, through her own

defloration and on into a myriad of experiences and variations. Along the way she is introduced upon occasion to the perverse, which—to her credit—she inevitably finds not to her liking.

The book has been introduced into evidence, and it is unnecessary to examine its contents in much greater detail. The actions and descriptions of the book are virtually entirely sex-oriented. Sexual relations of diverse kinds are described in an uncommonly explicit manner. The reader need do little searching, for the volume is so replete with descriptions of sexual intercourse and other erotica that the book may be opened virtually at random to display its wares. Those paragraphs not devoted to descriptions of the sex act frequently describe preparations for it, thoughts about it or reactions after it. Both the male and the female body are fully explored. There are abundant descriptions of clothing, generally inserted while such clothing is being removed or replaced prior to or subsequent to some erotic adventure. As Fanny herself comments at the outset of her second letter: "I imagined, indeed, that you would have been cloy'd and tired with uniformity of adventures and expressions. . . ."

The publisher insists that this is writing of literary merit and historical significance. The Attorney General would suggest, however, that the United States Supreme Court has not established an impossible standard, nor one which is to be applied in a preposterous manner. When the Court speaks in terms of social or literary value, it does not envisage the intellectual contortions of expert witnesses. The discovery of real value in a piece of writing need not cause such intellectual strain. The "social value" test poses a legitimate question which should be honestly responded to by a realistic appraisal of what the book in question offers.

Cleland was in no way a major or even a comparatively significant figure in eighteenth-century English literature. The fact that he was a contemporary of Richardson and Fielding does not in and of itself confer any particular importance upon him. The products of minor writers are of no greater consequence simply because works of substance are being written at the same time. Cleland's contribution to the development of the English novel was not sufficiently great to warrant his inclusion on college reading lists or his appearance in general collections. *Memoirs* cannot be defended as an example of the writing of a major author, or as a prime example of writing in a particular form or of a specific period. If the book is to be saved, it must be on its own merit alone.

The book has little more than the bare outline of a plot. Character development, despite some suggestions by expert witnesses appearing on behalf of the publisher, is practically non-existent. Individuals appear primarily as good or bad, clever or dull, etc. Fanny herself grows in experience, but changes little if at all in character. Descriptions of skill and consequence are confined entirely to sex portrayals; they are not devoted at all to places, and rarely to people. The Cleland "moral" that love is essential to the complete sexual relationship is neither original nor especially profound; in addition, it could have been presented just as forcefully with a fraction of the erotica which is the book's chief feature. The conclusion is unavoidable that the incredibly explicit sexual portrayals are included, not to illustrate a theme, but for their own sake and interest.

This is not a book that has anything particularly of consequence to say. It could hardly be compared to a masterpiece such as *Ulysses,* a product of a great literary figure who had much to comment upon beside the subject of sex. Critics have suggested that Fanny Hill would be

shocked by the language used by Lady Chatterly and her husband's gamekeeper. But the Lawrence volume is a work of social comment and recognized merit, and the author's reactions to the effects of industrialization in England certainly redeem the book, if indeed, redemption is necessary. Even *Tropic of Cancer*, distasteful as parts of it may be, contains excellent descriptions of Paris and many pages of Miller's interesting philosophy.

Memoirs can claim none of this. It can rely only on the fact that its various descriptions are offered with a degree of good humor and with an absence of coarse language. But the Attorney General contends that a good writing style is not sufficient under the standards developed in *Roth*. The "social value" test is one of substance, not merely of style. The Court has not envisioned that subject matter clearly obscene under each legal test is to be protected simply by virtue of the fact that its author has applied a highly developed vocabulary to his questionable product.

The trial justice, in his findings, rulings and order, characterized the book as follows:

> ". . . The book intimately describes in a continuous sequence one sexual adventure after another of the types above described mortised together with short transitory passages which simply set the stages for the recital of the ensuing sex adventures. Its evident purpose is to sexually arouse its readers and keep them aroused. . . ." (R. 113.)

The Attorney General admits that repetitious descriptions of sexual episodes do not necessarily make a work obscene. But such repetition is an indication of the book's purpose, and suggests what its relative merit may be.

Expert witnesses called by the publisher testified that the work "creates an effect that is primarily literary,"

"contains a 'plot with a purpose,'" and "is a 'novel of education.'" The heroine is described as an intellectual, and the book as a whole as a novel that "succeeds" (R. 42-43, 55, 59, 85).

The Court must of course make such decisions for itself. But the Attorney General suggests that the above comments add little to the analysis. Reflection by the narrator amounts to little if the subject matter upon which she reflects is essentially pornographic. The book may indeed have a purpose; but, since material other than sexual description is totally lacking, the Attorney General is forced to agree with the trial justice that such purpose clearly is to arouse the reader sexually and to keep him aroused.

The Attorney General agrees that the expression of ideas, no matter how hateful such ideas may be to the prevailing climate of opinion, has the full protection of the guaranties of the First Amendment. But an idea must exist before it can be protected. Ideas as such are totally absent in the book before the Court. The book is the literary equivalent of the pornographic picture, a product containing no intrinsic merit other than its power to arouse. It is that type of completely unredeemed material which—under *Roth* —is to be denied First Amendment protection.

II. The Average Person, Applying Contemporary Community Standards, will Find that the Dominant Theme of the Material Taken as a Whole Appeals to Prurient Interest; Accordingly, the Book in Question is Not Entitled to the Protection of the Guaranties of the First Amendment under the So-Called "Prurient Interest" Test.

The majority opinion in *Roth* v. *United States*, 354 U.S. 476, laid to rest the old obscenity test formulated in 1868

in England in the case of *Regina* v. *Hicklin*, L.R. 3 Q.B. 360. *Roth* developed another of the tests which determine obscenity, *i.e., whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest* (p. 489).

On the basis of each of the elements contained in the above-quoted rule, the Attorney General submits that the book in question is obscene under this test. The standard is that of the average person. Admittedly, this does not refer to the peculiarly susceptible individual into whose hands the book might happen to fall—the child, the pervert, etc. But neither does it refer to the highly motivated, literary person represented by the publisher's expert witnesses. It is not unfair to suggest that the average person will not—despite the publisher's contention—carefully peruse the Introduction by Peter Quennell and the historical Note included in the Putnam edition. Nor, it is safe to say, will he view the book primarily as an example of eighteenth-century English literature, or be especially engrossed by whatever moral its author may or may not have intended to develop.

The publisher implies that the reader who skips the Introduction in a hasty search for titillating passages must be disregarded. Such a statement flagrantly ignores the realistic facts of life about the reading public and the publishing business. A glance at any newsstand reveals that the publishing industry is clearly aware of the sale potential of sex-filled volumes. Such books are not published for the reader who examines introductions. The Attorney General submits that they are produced *for the average person,* one who purchases the book with a knowledge of what it is and the intention to indulge in what is clearly the book's prime attraction. Success in business is frequently a result of developing a product which does appeal to the

average person, so that the market for such product will be as broad as possible. This material is produced for the purpose of reaching as wide an audience as possible; otherwise such publication would be unwise from a business viewpoint. *Memoirs* was published for the average person and its passages appeal to and stimulate the ordinary reader. *Memoirs* appeals to the same person who purchases the less skillfully portrayed erotic volumes which occupy a larger and larger percentage of the literary market.

It is understood that the "average person" of the *Roth* case will naturally apply "contemporary community standards" to what he reads. The average reader is of course neither the especially susceptible person nor the literary expert who can view a highly erotic piece of writing as merely a segment of eighteenth-century English fiction. Likewise, "contemporary community standards" are not those of Victorian times, or even those in force prior to the Depression in the United States. But neither are they quite so liberal as the publisher would argue.

Contemporary attitudes toward sex and its discussion and portrayal are not such that the material contained in *Memoirs* can pass as normal fare acceptable to the mass of this nation's people. People may perhaps be more informed than ever before on matters of sex, and as a topic for discussion sex probably appears with greater frequency. The reader is often subjected to four-letter words and almost clinical sexual descriptions. But it simply is not true to state that there exists general public acceptance of what Cleland offers: approximately two hundred pages of continual and highly erotic sexual experiences, described in a manner which leaves virtually nothing to even the dullest imagination. No newspaper or magazine of general circulation contains such; and, should the subject matter be discussed in public, the average person would certainly be surprised and probably discomforted.

The publisher attempts to justify the book by establishing that contemporary community standards are such that the exploits of the heroine and the descriptions thereof are ordinary fare. Reference is made to the suggestive moving-picture advertisement, the beautiful woman in a television commercial, etc. But the distinction between use of an attractive young lady for the purpose of selling beer or automobiles and the material presented on page after page in *Memoirs* is not even a subtle one. The public is familiar with and accepts the appearance of women in television commercials; it does not accept what appears in *Memoirs*.

In the trial Court and before the Supreme Judicial Court the publisher referred to the extensive coverage given by the press to recent activities of certain members of the British Cabinet. But no newspaper reporter followed Miss Keeler and her acquaintances into the boudoir. Even the tabloid reports of the British scandals do not compare in any way to the descriptions in *Memoirs*. The Attorney General is not convinced that public interest in the British scandals indicates acceptance by the average person of the material offered by John Cleland.

In the light of consideration of the average person and of the community standards involved, the United States Supreme Court has directed that the material in question be examined to determine whether its dominant theme "appeals to prurient interest." Under the *Roth* decision the book as a whole must be examined, rather than simply isolated passages.

Examining *Memoirs* as a whole is not difficult. The scenes and subject matter of any given twenty-page section of the volume are for all practical purposes the same as those of any other twenty-page section. There is little if any problem of separating questionable passages from passages of merit. Books such as *Ulysses, Lady Chatter-*

ley's Lover and *Tropic of Cancer,* each of which has survived bitter censorship battles, contained many passages of real merit, and whole sections having nothing at all to do with sex. Such is not the case with *Memoirs;* the book can only be considered as a whole, since the material is virtually the same from cover to cover.

The dominant theme of the book is the portrayal in prose of sex and sexual relationships. That this was the author's purpose is inescapable, considering the amount of material and the percentage of the book devoted to the subject. The publisher may argue that the author's theme is something else; but no other theme or moral would require the incessant portrayals that feature the book in question. The amount of erotica that the work contains permits no conclusion but that sex portrayal is included for its own sake and was the primary reason for writing the book at all.

This Court has established as a standard whether the dominant theme "appeals to prurient interest." The Court noted that this test was very close to that proposed by the American Law Institute.

> "We perceive no significant difference between the meaning of obscenity developed in the case law and the definition of the A. L. I., Model Penal Code, § 207.10 (2) (Tent. Draft No. 6, 1957), *viz.:*
>
> "'. . . A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. . . .'"
>
> *Roth* v. *United States, supra,* at page 487.

As discussed above, the book clearly goes far beyond what the public has become accustomed to in sexual descrip-

tion. The Attorney General submits that the chief—and in most cases the only—reason that this book is purchased is because of what the material offers in the way of exciting erotic passages and unusual representations of sexual relationships. The average person selects this book because he can find therein material which is unusual, and rarely produced for consumption by the general reading public. It cannot be too strongly emphasized that the United States Supreme Court has not created an impossible standard. Had it been the Court's purpose to extend the First Amendment to cover all writing no matter what the quality or subject matter, the Court would have said so. The Court has established tests which must be viewed from a practical point of view. The fact of the matter is that the average person picks up this book in order to peruse the sexual descriptions. Such may not be the object of the English professor; but his is not the standard identified by the Court. The dominant theme of this book is sex and its portrayal, and as such it clearly appeals to the interest or desire of the ordinary person to examine the unusual and ordinarily forbidden material that it offers.

III. The Book in Question is Not Entitled to the Protection of the First Amendment Guaranties, because it is "Patently Offensive" in the Sense in which That Expression is Used in the Case of Manual Enterprises, Inc., v. Day.

In *Manual Enterprises, Inc.*, v. *Day*, 370 U.S. 478, the United States Supreme Court made it clear that the "prurient interest" test was not the sole means by which obscenity should be determined. Referring to certain magazines that had been presented for consideration, the Court formulated the "patent offensiveness" or "indecency" test.

> ". . . These magazines cannot be deemed so offensive on their face as to affront current community standards of decency—a quality that we shall hereafter refer to as 'patent offensiveness' or 'indecency.' Lacking that quality, the magazines cannot be deemed legally 'obscene,' and we need not consider the question of the proper 'audience' by which their 'prurient interest' appeal should be judged."
>
> *Manual Enterprises, Inc.*, v. *Day, supra,* at page 482.

This test frequently, of course, requires considerations similar to those necessary under the "prurient interest" test, since material whose dominant theme appeals to prurient interest will more often than not offend the ordinary reader. However, the Court has stated it as a separate test, and the book must be examined from the separate viewpoint of whether its material is or is not offensive to the average reader.

The publisher points out that the book is inoffensive in expression. But offensiveness is not limited to use of four-letter words, or even to the degrading portrayals that feature a work such as *Tropic of Cancer*. Something is patently offensive when it violates an individual's concept of appropriate behavior. An occasional description of a sexual encounter included for a purpose that relates to other subject matter will probably not offend any but the most sensitive. But a work devoted completely to the most explicit sexual descriptions, no matter how well written, does—it is submitted—offend the average person.

The "patent offensiveness" test appears to be designed as a "safety valve" to protect against overly vigorous application of the prurient interest standard. It is conceivable that material which appeals primarily to prurient in-

terest in the sense discussed above might nevertheless—for some reason—not be offensive to the average member of the community. If such a piece of writing exists, the patent offensiveness or indecency test would undoubtedly protect it.

This is a test which relates to the sense of propriety and good taste of the average person. The desirability of freedom to dissent and to adopt unpopular positions is protected by the "social importance" test, and does not relate to the indecency test of *Manual Enterprises.* The latter test is directed, not to the protection of the right to disagree, but to the identification of the thoughts and reactions of the average members of the national community. It is not meant to be a shield to protect highly erotic writing which clearly meets the other legal tests of obscenity, simply because the offensive material may perhaps be well written. Skillful writing will not save what is patently offensive upon its face. The Attorney General submits that the overwhelming amount of erotic material to be found in *Memoirs,* obviously offered entirely for its own sake, and with descriptions going far beyond what normally may be expected, makes the book patently offensive to the average person in the sense of the *Manual Enterprises* decision.

IV. The Standards Set Forth by the United States Supreme Court in Roth and Manual Enterprises have Not been Altered; Fair Application of Such Standards Requires that "Memoirs" be Adjudged to be Obscene and Not Entitled to the Protection of the Guaranties of the First Amendment.

Roth and *Manual Enterprises* still set forth the standards by which expression is to be judged. The United States Supreme Court has yet to adopt the minority posi-

tion that the First Amendment is absolute and that accordingly anti-obscenity legislation can never be constitutional. A majority of the Court still agrees that certain types of material will not be constitutionally protected, and that such material may lawfully be suppressed by the states. The standards of *Roth* and *Manual Enterprises* are still the law of the land, irrespective of reluctance by some state and federal courts to apply them. Nothing after *Roth* in any way implies that this case is no longer the primary guide in this area.

Shortly after the rendering of the *Roth* decision the United States Supreme Court—in four *per curiam* decisions [1]—reversed rulings of federal Courts of Appeals which had treated varying types of material as obscene. The cases involved a film relating to the seduction of a young man by an older woman; nudist publications; and a magazine published for homosexuals. The present publisher has implied—while the present matter was before the Supreme Judicial Court of Massachusetts—that reversal of the decisions that these materials were obscene indicates *a fortiori* that *Memoirs* must be protected.

The petitioner admits that the decisions of the lower federal courts were reversed in these cases. In fact, in the *Mounce* case, error was confessed by the Solicitor General prior to argument. It does not appear that the Court acted in any way upon the question whether the materials were or were not obscene. The lower federal courts whose decisions were reviewed had applied obscenity standards other than those set forth in the *Roth* case. (The *Roth* case had just been decided.) These *per curiam* reversals appear to

[1] *Times Film Corp.* v. *Chicago*, 355 U.S. 35 (revg. 244 F. 2d 432, 436 [7th Cir.]). *Mounce* v. *United States*, 355 U.S. 180 (revg. 247 F. 2d 148 [9th Cir.]). *One, Inc.*, v. *Olesen*, 355 U.S. 371 (revg. 241 F. 2d 772 [9th Cir.]). *Sunshine Book Co.* v. *Summerfield*, 355 U.S. 372 (revg. 249 F. 2d 114 (Ct. App. D.C.)).

have been a means by which this Court instructed the lower federal courts as to the changes brought about by the *Roth* decision. They cast no light upon the particular materials that happened to be before the Court.

Quite recent statements by the United State Supreme Court on the subject of obscenity appeared in three decisions rendered on June 22, 1964. These decisions have simply reaffirmed the standards set forth in *Roth*. *A Quantity of Copies of Books* v. *Kansas*, 378 U.S. 205, involved the constitutionality of a particular state procedure. It had been the custom of the State of Kansas to seize allegedly obscene material prior to the holding of an adversary hearing on the subject of obscenity. The Court ruled that such seizure was an unlawful restraint, and declared the statute authorizing it to be unconstitutional. At no time in this case did the majority express itself on the question of obscenity of the materials involved. The *Kansas* case in no way affects the present obscenity standards, and is of little help in resolving the present dispute.

In *Jacobellis* v. *Ohio, supra,* the United States Supreme Court reversed a state court conviction of an Ohio theater manager for exhibiting the film "The Lovers." The statute pursuant to which parts of the film had been held to be obscene was held by the Court to violate the constitutional guaranties of freedom of expression. The Court took the opportunity to define further the phrase "contemporary community standards," explaining that the community standards referred to must be national rather than local. The case is of special interest to the present litigation because of its clear reiteration of the standards set forth seven years earlier in *Roth* v. *United States*. The Court stated, at page 191: "Recognizing that the test for obscenity enunciated there . . . is not perfect, we think any substitute would raise equally difficult problems, and we therefore adhere to that standard." And at page 196

the Court concluded: "We have viewed the film, in the light of the record made in the trial court, and we conclude that it is not obscene within the standards enunciated in *Roth* v. *United States* and *Alberts* v. *California, which we reaffirm here.*" (Emphasis supplied.)

In *Grove Press, Inc.*, v. *Gerstein*, 378 U.S. 577, the Court reversed an adjudication by the Supreme Court of Florida that Henry Miller's *Tropic of Cancer* was obscene. The Supreme Judicial Court of Massachusetts has already recognized that *Tropic of Cancer* is entitled to First Amendment protection (*Attorney General* v. *The Book Named "Tropic of Cancer,"* 345 Mass. 11), and the *Gerstein* case supports that decision.

Following *Roth*, the Supreme Judicial Court ruled that the question of obscenity was one requiring the exercise of constitutional judgment, and that only material that was without redeeming social significance could properly be considered obscene. Under the "prurient interest" test, material must be judged by its effect upon the average person, and it must of course be considered as a whole. The portrayal of sex in and of itself is not sufficient to deny a work First Amendment protection; but hard-core commercial pornography without redeeming importance would not be protected.

In a four to three decision the Court decided that in *Tropic* Henry Miller had made a conscious effort to create a literary work of art, and that he had achieved a product of some significance. It must be conceded that Miller is a major twentieth-century writer. The book—in its own way—is brilliantly written, with some outstanding descriptive passages. The reader may well disagree with much of it; but Miller's philosophy and view of society between the wars is powerful and extremely relevant. Clearly, what *Tropic* offers of value prevents its being adjudged obscene.

The Attorney General is aware of the decision of the New York Court of Appeals in *Larkin* v. *G. P. Putnam's Sons,* 14 N.Y. 2d 399, 200 N.E. 2d 760, wherein a majority of that Court ruled that *Memoirs* was entitled to First Amendment protection. The Attorney General submits that the New York Court is in error, and agrees with dissenting Justices Desmond and Scileppi that the majority simply did not apply existing law realistically. The thought processes of the majority are difficult to reconstruct from the majority opinion, which lacks any real attempt to analyze the book or to apply appropriate standards. Individuals may disagree with the standards of *Roth;* but these standards should not be altered by fiat of state courts.

Memoirs is not *Tropic of Cancer.* Admittedly lacking the shock treatment technique of *Tropic,* it is yet more sex-oriented, more offensive through its constant, unrelieved repetition. The saving philosophical and descriptive values of *Tropic* are totally lacking in *Memoirs.* The publisher has—in defense of the book—struggled to apply the standards of *Roth* and *Manual Enterprises.* The publisher has sought to expand First Amendment guaranties, which, in the past, have protected works such as *Ulysses, Lady Chatterly's Lover* and *Tropic of Cancer,* to a point far beyond what the United States Supreme Court has indicated is the limitation upon those guaranties. It cannot seriously be maintained that *Memoirs* ranks with the above-mentioned volumes. A collection of sexual episodes and nothing else, it totally lacks the redeeming value which would warrant First Amendment protection.

The Attorney General grants that the "freedom of speech" clause of the First Amendment is and should be liberally construed. Nevertheless, this Court has clearly established that obscenity is not entitled to the protection of the First Amendment guaranties. Accordingly, the

Court has developed the three tests discussed above as guides to a determination as to whether given materials are to be held to be obscene. At no time has the Court indicated, despite the publisher's insistence that books must be given special treatment, that these tests were not to be applicable to all types of expression—books as well as films, periodicals as well as recordings. Had this Court desired to insulate books completely from the operation of obscenity legislation, it presumably would have said so with clarity.

Were the three tests of obscenity to be discussed but never realistically applied, development of these tests by the United States Supreme Court would have been a vain endeavor. The Attorney General submits that this Court would not have concerned itself with the development of standards unless the Court intended that—at least on occasion—the standards would operate so that a given piece of writing would be declared obscene on the basis of them. *Memoirs* subjects the reluctance to apply these standards to its ultimate strain; should this Court rule that application of the three tests does not require an adjudication of obscenity, it is extremely doubtful that the tests may ever successfully be applied to writing which is in novel form.

Conclusion.

It is not the business of the Attorney General to be either a critic or a censor; but his duties do include clarification and enforcement of the law. The questions raised by the necessity of balancing First Amendment guaranties with the rights of the states under their police power to regulate the publication and distribution of obscene materials are extremely sensitive ones, and easy solutions are not available. The decision by the Supreme Judicial Court to

the effect that *Memoirs* is obscene is the first time since the rendering of the *Roth* decision that that Court has concluded that a given piece of writing could constitutionally be suppressed. Because of the nature of the writing in question, it is hoped that treatment by the United States Supreme Court not only will further clarify the rights of the states and the effect of the First Amendment upon such rights, but will also be of value in the making of decisions with respect to enforcement of obscenity legislation.

If obscenity legislation is to have an effect upon books at all, it must have an effect upon this one. Should the United States Supreme Court determine—for one reason or another—that the public cannot constitutionally be deprived of *Memoirs,* then, it is submitted, the tests of *Roth* and *Manual Enterprises* must—at least in this one case—be altered or suspended. If, however, the tests are to be reasonably applied, this book must be declared to be obscene, and consequently not protected by the First Amendment. Accordingly, it is respectfully requested that this Court affirm the decision of the Supreme Judicial Court of Massachusetts and the final decree entered thereon.

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IN THE

Supreme Court of the United States

October Term, 1965
No. 368

A book named "JOHN CLELAND'S MEMOIRS OF A WOMAN OF PLEASURE", G. P. PUTNAM'S SONS (Intervenor),

Appellant,

vs.

ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS,

Appellee.

On Appeal From the Supreme Judicial Court of Massachusetts.

Motion for Leave for Counsel for Amicus Curiae Citizens for Decent Literature, Inc., an Ohio Corporation to Participate in Oral Argument.

Citizens for Decent Literature Inc., an Ohio Corporation, has heretofore, pursuant to Rule 42 of the Revised Rules of the Supreme Court of the United States, filed a motion for leave of court to file a brief amicus curiae in support of Appellee, which brief was attached to and filed concurrently with said motion.

Citizens for Decent Literature, Inc., respectfully moves at this time, pursuant to Rule 44.7 of said rules,

for special leave of Court for its Counsel to participate in oral argument, for the following reasons:

Both Appellant and Appellee, in their briefs herein, treat the Roth test as composed of three *independent* tests; namely, social value, prurient interest, and patent offensiveness. Our brief rejects this concept. In our view, the governmental purpose of obscenity legislation is to proscribe material whose predominant appeal is to prurient interest. The ascertainment of the nature of the "predominant appeal" of any given subject matter is accomplished through a "balancing" process in the Roth test, which considers and weighs both the social value factor and the prurient interest factor of the subject matter. We submit that prior case law and the American Law Institute, Model Penal Code recommendations support our interpretation.

In our view, neither Appellant nor Appellee give sufficient consideration to the governmental purpose for obscenity legislation, its historical development, and the significance of the appearance of "Fanny Hill" on the markets today, as factors to be weighed in the balance, in applying the Roth test.

We believe that oral argument on the above issues will provide assistance to this Court, not otherwise available.

Respectfully submitted,

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Counsel for Amicus Curiae.

INDEX

PAGE

APPELLEE'S POINT I—SOCIAL IMPORTANCE 1

APPELLEE'S POINT II—PRURIENT INTEREST 11

APPELLEE'S POINT III—PATENT OFFENSIVENESS 18

APPELLEE'S POINT IV AND CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Alberts v. *California*, 354 U. S. 476 .....3, 21, 23, 26

Attorney General v. *God's Little Acre*, 326 Mass. 281, 93 N. E. 2d 819 4

Attorney General v. *Tropic of Cancer*, 345 Mass. 11, 184 N. E. 2d 328 .....2, 16, 23, 26

City of Chicago v. *Kimmel*, 31 Ill. 2d 202, 201 N. E. 2d 386 23

Commonwealth v. *Eisenstadt*, 318 Mass. 546, 62 N. E. 2d 840 4

Commonwealth v. *Friede*, 271 Mass. 318, 171 N. E. 472 4

Grove Press, Inc. v. *Gerstein*, 378 U. S. 577 23

Grove Press, Inc. v. *Christenberry*, 276 F. 2d 433 10

Jacobellis v. *Ohio*, 378 U. S. 184 .....2, 20, 21,23

Larkin v. *G. P. Putnam's Sons*, 14 N. Y. 2d 399, 200 N. E. 2d 760 ..... 22, 23

PAGE

Manual Enterprises, Inc. v. *Day*, 370 U. S. 478 ..... 18, 19
McCauley v. *Tropic of Cancer*, 20 Wis. 2d 134, 121 N. W. 2d 545 23
Mounce v. *United States*, 355 U. S. 180 22

One, Inc. v. *Olesen*, 355 U. S. 371 21

Panhandle Oil Co. v. *Mississippi ex rel. Knox* 277 U. S. 218 25
People v. *Bookcase, Inc.*, 14 N. Y. 2d 409, 201 N. E. 2d 14 24
People v. *Bruce*, 31 Ill. 2d 459, 202 N. E. 2d 497 23
People v. *Fritch*, 13 N. Y. 2d 119, 192 N. E. 2d 713 23

Roth v. *United States*, 354 U. S. 476 ..2, 6, 11, 15, 18, 20, 21, 23, 26

Sunshine Book Co. v. *Summerfield*, 355 U. S. 352 21

Times Film Corp. v. *Chicago*, 355 U. S. 835 21

United States v. *Ulysses*, 72 F. 2d 705 4

Zeitlin v. *Arnebergh*, 59 Cal. 2d 901, 383 P. 2d 152, cert. den. 375 U. S. 957 23

MISCELLANEOUS

Pegis, *Basic Writings of St. Thomas Aquinas* (Random House, 1945, Vol. 2) 16

Rommen, *In Defense of Natural Law*, in *Law and Philosophy* (New York University Press, 1964) .. 16

Supreme Court of the United States

OCTOBER TERM, 1965.

A Book Named "John Cleland's Memoirs of A Woman of Pleasure", G. P. Putnam's Sons (Intervenor), *Appellant*, *v.* Attorney General of the Commonwealth of Massachusetts, *Appellee.*	No. 368.

REPLY BRIEF FOR APPELLANT

Appellee's Point I—Social Importance[1]

Appellee, we suggest, reads too quickly. He speaks at one point of what may be found if the book is opened "at random" (7), and at another he refers to "any given twenty-page section" (13). He dwells on the subject matter of the book, while he neglects its qualities as literature and ignores the observations and reflections, large and small, that would impress a reader proceeding at normal pace. The attitude adopted by Appellee is that of the browser rather than the reader. This affects his entire argument.

It is also affected by the fact that Appellee imports elements of the prurient interest test and the patent offensive-

[1] For convenience, this reply brief follows the outline of the Brief for Appellee. Numbered references are to pages of the Brief for Appellee, unless otherwise indicated.

ness test into the discussion of social value. He argues, under this head, that *Memoirs* describes sexual relations "in an uncommonly explicit manner" (7) and cites the book's "power to arouse" (10), having quoted the trial justice to this effect (9).[2] These items are relevant, if at all, to the tests of prurient interest and patent offensiveness. Whether a book has the literary or scientific or artistic value that constitutes social importance is the sole inquiry on the present point. Appellee recognizes this, and states that "material containing some redeeming features or 'social value' must be accorded the guaranties of the First Amendment" and that only "material utterly lacking in such value" may "constitutionally be suppressed" (5). Yet Appellee contradicts his own statement of the standard; he would deny that there is value in the book because, he asserts, it is explicit and sexually stimulating.

Appellee's argument here is affected, again, by his reduction of the social value test to a level where it would protect only "ideas" in an extremely restricted sense (8, 9, 10). He would confine social importance to the expository communication of ideas, and exclude literary and artistic values. This position contradicts the statement of *Jacobellis* (which Appellee cites) "that material dealing with sex in a manner that advocates *ideas . . . or* that has *literary or* scientific *or artistic value or* any other form of social importance, may not be branded as obscenity and denied the constitutional protection" (378 U. S. 184, 191; emphasis supplied).[3]

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[2] The Findings, Rulings and Order of the trial justice are, we submit, full of error. An indication is seen in the trial justice's statement (R. 113) that "This 'book is pitched at the nadir of scatology'. . . ." There is, of course, no scatology in *Memoirs.*

[3] As well as the statement of the Massachusetts Supreme Judicial Court, in *Attorney General* v. *Tropic of Cancer,* that "the First Amendment protects material which has value because of ideas, news, or artistic, literary, or scientific attributes . . ." (345 Mass. 11, 19, 184 N. E. 2d 328, 333).

Appellee distorts the social value test in other ways. His argument implies that the test demands greatness in a work. Appellee compares *Memoirs* "to a masterpiece such as *Ulysses*" (8); complains that "Cleland was in no way a major or even a comparatively significant figure in eighteenth-century English literature" (8); and speaks of what the "relative merit" of the book may be (9). But a standard that preserves First Amendment protection for all material except that which is "utterly without social importance" does not distinguish between major and minor writers, nor does it confine its protection to "masterpieces".[4] Appellee's argument here represents a reversion to the pre-*Roth* notion that, among works which might be deemed sexually stimulating, only "classics" were beyond the reach of anti-obscenity statutes. At least since the time of *Roth* and *Alberts,* it has been the law that if a work has a demonstrated literary value, the First Amendment applies, and the precise place of the work in the ranks of literature—a place which, experience shows, may vary widely from generation to generation—is of no constitutional concern.

Appellee also argues that *Memoirs* has not been included in college reading lists or general collections (8). We suggest that it is not realistic to attribute this to lack of merit. Moreover, Appellee's statement can refer only to the past; the fact that many college libraries have ordered copies of the book (R. 83) indicates that it will not hold good for the future. The book is unlikely to appear in undergraduate curricula, but it might very well be included in graduate studies. Finally, and fundamentally, the question in a case such as this one is not whether the work should be read in

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[4] When Appellee says that Cleland was not a "major" figure, we can agree; when he says that "Cleland was in no way . . . even a comparatively significant figure in eighteenth-century English literature", he is making a statement that is contrary to the record (R. 28-31, 55-56, 72, 88).

college courses, but whether government, state or federal, should be permitted to decree its total suppression.[5]

Appellee assumes that if the values of a work are apparent only to better-educated readers, then those values need not be recognized for constitutional purposes (8). This would make the average person (or possibly the person below average) the judge of what books have sufficient merit to be preserved against suppression. The argument both borrows and alters a concept taken from the prurient interest test, and it works an extreme distortion upon the concepts of literary and artistic value. Appreciation of art and literature can often be gained only through an expenditure of effort; a certain level of cultivation or a certain amount of background may be required. The best of painting and music and writing demands an active participation on the part of the viewer or listener or reader. It is easy to be entertained; it is not always easy to attain the deeper satisfactions that art affords. Instances abound of works, acknowledged to be valuable, whose appreciation can be a difficult matter. Indeed, Appellee himself cites one of them: the merits of *Ulysses* are not apparent to the average reader, or even to many whose education in

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[5] Appellee seeks to make a point of the fact that, until recently, the circulation of the work has been "for the most part clandestine" (6). Examples of works of value whose circulation has, by force of law, been kept clandestine are of course plentiful. Appellee's own state supplies examples: Theodore Dreiser's *An American Tragedy* (271 Mass. 318, 171 N. E. 472), Lillian Smith's *Strange Fruit* (318 Mass. 546, 62 N. E. 2d 840), Erskine Caldwell's *God's Little Acre* (326 Mass. 281, 93 N. E. 2d 819). *Ulysses* and *Lady Chatterley's Lover* are other examples, and, in connection with the former, Judge Augustus Hand's observation may be recalled:

> ". . . The foolish judgments of Lord Eldon about one hundred years ago, proscribing the works of Byron and Southey, and the finding by a jury under a charge by Lord Denman that the publication of Shelley's 'Queen Mab' was an indictable offense are a warning to all who have to determine the limits within which authors may exercise themselves . . ." (*United States* v. *Ulysses*, 72 F. 2d 705, 708).

literature is considerably above average. If the necessary degree of education has not been attained, a great work may only be puzzling, or boring.

We do not concede that the merits of *Memoirs* are so arcane. An attentive reading, of the whole book, is all that is required, not a course in eighteenth-century literature. *Memoirs* is not great literature, but its values as literature are substantial, and not at all difficult for the serious reader to appreciate. But if the values of the work were apparent only to a learned few, that fact would not prove the utter absence of social importance. The First Amendment protects works whose values may be apparent only to a minority. There is no snobbishness in this principle; on the contrary, it is part of the prescription for a healthy democracy.

Appellee mentions "intellectual contortions of expert witnesses" and "intellectual strain" (7). We refer to the material on pages 26 and 27 of our main brief, and submit that a reading of the testimony, and of the documentary evidence, reveals no contortions and no strain. The values that are pointed out can be seen by any careful reader of the book; he need not be a professional scholar or critic.

Appellee treats the phrase "redeeming social importance" as though the redemption of material dealing with sex can be accomplished only by the inclusion, in the same work, of material dealing with other subjects (10). He asserts (incorrectly, we submit) that "material other than sexual description is totally lacking" in *Memoirs*. By way of contrast, he finds the redemption of *Lady Chatterley's Lover* in "the author's reactions to the effects of industrialization in England" and of *Tropic of Cancer* in its "excellent descriptions of Paris and many pages of Miller's interesting philosophy" (9). Appellee thus interprets the social value test to mean that sex can be the subject of a book only if the book has other subjects as well; the writer must pay a toll of non-sexual material when he wishes to write about sex. If the point had any relevance, it would

be to the prurient interest test. It surely cannot affect the literary merit of a book that it deals with one subject rather than another, nor will this Court accept the notion that the subject of sex is an unimportant one (*Roth* v. *United States*, 354 U. S. 476 487).

Appellee charges that the "book has little more than the bare outline of a plot" (8). Elaborate plotting may often be appropriate, but it is certainly not a necessary element in a work of literature. Early novels are often collections of episodes, and, to move to the twentieth century, it is difficult to give a coherent summary of the plot of *Tropic of Cancer*, or of other impressionistic writing whose merit has been recognized. But the fact is that *Memoirs* has a definite plot, which involves not only the heroine's experiences, but also the growth of her understanding and the maturing of her character (R. 42-43, 54-55, 59-64, 73).

Appellee next says:

> "Character development, despite some suggestions by expert witnesses appearing on behalf of the publisher, is practically non-existent. Individuals appear primarily as good or bad, clever or dull, etc. Fanny herself grows in experience, but changes little if at all in character. Descriptions of skill and consequence are confined entirely to sex portrayals; they are not devoted at all to places, and rarely to people." (8)

In stating that there are "descriptions of skill and consequence" in the sex portrayals, Appellee, we suggest, is stating himself out of court. Assuming that a work were devoted entirely to "sex portrayals", still it would not be subject to suppression if it were at the same time "literature of skill and consequence". Indeed, in speaking of "consequence", Appellee has chosen a synonym of "importance".

But in any event the quoted passage is inaccurate from beginning to end. It cannot be made to jibe with any sort of fair reading of the book. Appellee is simply

not describing the book before the Court. Fanny herself is a sharply delineated character. Often capricious in her actions, she is conscious of her faults, introspective and unsparing about her motives. She is acute in her observation of people; generally tolerant, she is capable of indignation. She displays a democratic bias—an emphasis on the character of an individual as distinguished from his station in society—that is particularly interesting in the period of sharp social differentiation in which the book was written. Combining a natural lustiness with a respect for the processes of intellect, she represents, in these aspects, a model of the Enlightenment.

Charles displays tenderness and fidelity, and, in the beginning, he is able to teach Fanny about the world. But he has faults, and Fanny is conscious of them. He is careless with money; he is poorly educated; the store of knowledge that he can impart to Fanny is soon learned; and, as Fanny herself points out, he lacks "those great and shining qualities that constitute a genius, or are fit to make a noise in the world" (Ex. A., p. 57). It is characteristic of each of them that it is Fanny, not Charles, who brings a fortune to their union.

The fortune comes from Fanny's older lover, the "rational pleasurist" (Ex. A, p. 200). He is a self-made man, a representative of the eighteenth-century entrepreneurial ideal. His legacy to Fanny, as she recognizes, is more than money. He teaches her self-respect and the possibilities of self-improvement. By his example, he shows her the proper uses of wealth, the importance of dignity, and the values of moderation. He is the first from whom Fanny derives her final philosophy that the pleasures of the mind are superior to the pleasures of the body, and that the two are not incompatible, but complementary.

Mrs. Cole is a complicated character, who will not fit into Appellee's categories of "good or bad". Scrupulously fair

with her girls, she is not above occasionally deceiving a customer. She teaches Fanny how to take care of herself, physically and financially. Generally compassionate, she is nevertheless bitter on the subject of homosexuality: "* * * *in fine,* they were scarce less execrable than ridiculous in their monstrous inconsistence, of loathing and condemning women, and all at the same time apeing all their manners, airs, lips, skuttle, and, in general, all their little modes of affectation, which become them at least better than they do these unsex'd male-misses." (Ex. A, pp. 182-183.) Fanny gains a good deal in understanding from Mrs. Cole, but later rejects her primitive hedonism.

Fanny's motivations at the various turns in her history are plausible and psychologically valid. She is a real person, and not one of the automatons that act out the mechanistic trash which occupies so much space on our newsstands. Through her are presented the observations and reflections that mark a work of literature.

The many minor characters are described with wit and perception. Mrs. Jones, Fanny's first landlady, is totally motivated by money, "indifferent . . . to every other pleasure but that of increasing the lump by any means whatever . . ." (Ex. A, p. 61). Fanny's colleague, Emily, is "one of those mild, pliant characters that if one does not entirely esteem, one can scarce help loving, which is not such a bad compensation neither. Owing all her weakness to good-nature, and an indolent facility that kept her too much at the mercy of first impressions, she had just sense enough to know that she wanted leading-strings, and thought herself so much obliged to any one who would take the pains to think for her . . ." (Ex. A, p. 196).

The flagellant, Mr. Barville, is described with striking insight. His physical appearance is peculiarly appropri-

ate to his sick personality. Fanny makes the interestingly modern discovery that his cruelty to others comes from a hatred for himself, and that his masochism (a malady then not yet named) "render'd him incapable of receiving any pleasure till he submitted to the extraordinary means of procuring it at the hands of pain" (Ex. A, p. 168). She even suggests a possible source of his trouble; he was "condemn'd to have his pleasure lashed into him, as boys have their learning" (Ex. A, p. 167).

These are examples of characterization, not an exhaustive list. (The comments of the witnesses and the critics on the point appear at R. 28-32, 42-43, 45, 54-57, 64, 67, 74, 87.) The summaries are enough to demonstrate the inaccuracy of Appellee's statement, but they do not do justice to Cleland's work. The book deserves to be read as carefully as Cleland wrote it.

The culminating idea that Fanny presents—which, as Appellee puts it, is "that love is essential to the complete sexual relationship"—is, he argues, "neither original nor especially profound" (8). As to its "profundity", certainly the idea goes to the heart of the human experience. As to originality of basic ideas, if that were a requisite, there would be very few works of fiction that could claim social importance. It is the philosopher's function, not the novelist's or the playwright's, to produce major original ideas. That ambition, jealousy and irresolution can destroy a man are themes that were thought of and expressed before *Macbeth, Othello* and *Hamlet* were written.

The idea, says Appellee, "could have been presented just as forcefully with a fraction of the erotica . . ." (8). And he objects that the "sexual portrayals are included not to illustrate a theme, but for their own sake and interest" (8). But this is a novel, not a tract. Indeed, it is a frequently-encountered criticism of unsuccessful novels that they constitute argument with examples attached, rather

than products of the art of fiction.[6] Moreover, Appellee is prescribing a course for the writer to follow: he is thus undertaking a responsibility that is the artist's own, and not the government's.[7]

Appellee concludes his discussion of social value by repeating his two main points. One is that "Ideas as such are totally absent in the book before the Court" (10). This is both inaccurate and irrelevant. *Memoirs* tells us about people, and how they react to each other; it describes events and emotions. This is the principal business of fictional literature. Ideas in the expository sense may often be included in fiction, and they are included in this book, as Fanny generalizes upon her experiences. But even if they were not, their absence would not prove the absence of value. What is the "idea as such" in Yeats' *Leda and the Swan,* or in Hemingway's *The Killers?*

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[6] *Lady Chatterley's Lover* has been adversely criticized for the very characteristic to which Appellee attributes its protection. Its tendency to become an exhortatory essay impairs its quality as a novel. Thus, in reviewing the book for the *Washington Post & Times-Herald* (May 3, 1959) Glendy Culligan wrote:

> "It is both ironic and characteristic of Lawrence that his artistic failure in "Lady Chatterley" came not from an excess of lust but an excess of moral indignation. The early love scenes achieve a poetic tension which has probably not been duplicated in English literature, but Lawrence allowed a vituperative note to destroy the effect of later meetings. In them, Mellors steps out of character to become the mouthpiece for Lawrence and for his chronic shrill attack on modern woman. There, the pulpit replaces the drama."

[7] See Clark, Ch. J., in holding *Lady Chatterley's Lover* not obscene:

> "* * * Obviously a writer can employ various means to achieve the effect he has in mind, and so probably Lawrence could have omitted some of the passages found 'smutty' by the Postmaster General and yet have produced an effective work of literature. But clearly it would not have been the book he planned. * * *" (*Grove Press, Inc.* v. *Christenberry,* 276 F. 2d 433, 438 (2 Cir.).)

The other point to which Appellee returns is that the book is "a product containing no intrinsic merit other than its power to arouse." Scanning "at random" will perhaps produce the impression of the book on which Appellee's brief is based. There are of course many sexual incidents, and detailed descriptions, and if the leaves of the volume are spun, the impression may well be different from that which is gained when the book is really read. Appellee refuses to see what each of the qualified witnesses sees in the book, and what V. S. Pritchett, Brigid Brophy and J. Donald Adams see in the book, and what any reasonably attentive reading of the book itself discloses.

Appellee's Point II—Prurient Interest

Appellee uses the concept "average person" in two quite different ways. At times he speaks of the impact of the book on the average person—that is, the person not particularly susceptible—and this is in accord with the statement of the prurient interest test in *Roth*. At other times he speaks of the average person as the one who will judge whether the book is obscene, and this, as we have urged in our main brief, is not the meaning of the prurient interest test. Page 12 of his brief has the average person measuring what he reads against contemporary community standards; Appellee thus transfers to the average person a function that belongs to the courts. At both pages 11 and 12 of his brief, Appellee contrasts the average person with the literary expert. But the Publisher's witnesses were not called to testify with respect to prurient interest; they were called to testify with respect to social value. So far as the prurient interest test is concerned, one who is highly educated in literature may or may not represent the "average person"; similarly, one who is poorly educated in literature may or may not be "average" in this sense. The distinction that Appellee draws has no relevance to the prurient interest test. And, so far as the social value test is concerned, Appellee's contrast of the expert with the average man means that the outcome should be deter-

mined by a hypothetical majority, in contravention of the central meaning of the First Amendment.[8]

On these same pages, Appellee emphasizes the frequent appearance and wide distribution of "sex-filled volumes". It is difficult to see how this helps his case. If it demonstrates anything, it demonstrates contemporary community acceptance of the subject of sex in reading matter. Moreover, Appellee's reference to "newsstands" suggests that most of what he has in mind is quite different from *Memoirs*. The usual newsstand paperback dealing with sex is not ordered by universities and libraries (R. 83).

On the point of what the public has become inured to, Appellee says that the newspaper reports of the Profumo affair "do not compare in any way to the descriptions in *Memoirs*" (13). We respectfully refer the Court to Exhibits C through I (unprinted).[9]

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[8] Appellee's argument at this point seems to derive from older cases in which literary value was regarded as significant only if it outweighed lustfulness—an approach which antedates judicial consideration of the matter in a constitutional context, and which involves a balancing of interests not appropriate where expression alone (and not expression mixed with conduct) is at issue.

[9] They include the following:

> "The next witness Margaret Ricardo admitted one conviction for prostitution. She said she and a girl friend and Ward and another man all had sex relations in the same room. ¶'All four together?' inquired Judge Marshall. ¶'Yes.' ¶'All four of you taking part?' the judge persisted. ¶'Yes.' ¶'What happened in the room with the four of you together?' the judge continued. 'Anything beyond sexual intercourse?' ¶Miss Ricardo, a 23-year-old former Paris night club dancer shook her head affirmatively." (*Boston Traveler*, July 23, 1963, p. 12, cols. 3-6)
>
> ". . . galloping rumors of a prominent person wearing only a mask while serving as a slave waiter at an orgy of play-for-pay girls and their male customers." (*Boston Record-American*, July 1, 1963, p. 5, col. 5)

If a national rather than a local standard is to be applied, the treatment of the affair in newspapers outside Boston may be noted.

(Footnote continued on next page)

We agree with Appellee that there are differences between these reports and *Memoirs*. The newspaper reports offer the excitement of telling about real people, and people in high places; they add the stimulation of photographs; there is an air of morbidity that the book as a whole does not have; and the total audience reached by the newspapers is many times that of the book. There is also a difference in that the social value involved is that of news rather than literature. But with respect to community tolerance toward the treatment of sexual incidents on the printed page, the similarity is striking.

(Since these quotations are made only to show the fact of what appeared in prominent daily newspapers, and not to prove the truth of the matters reported, the taking of judicial notice is, we submit, appropriate.) The daily having the largest circulation in the United States contained the following:

> "Maria claims that the man in the hangman's style mask wore brief, striped underpants at the party, but other guests are definite that he wore no more than a pink ribbon bow in addition to his mask and that guests amused themselves by tugging at it while he was serving them." (*New York Daily News*, July 6, 1963, p. 4, col. 1)
>
> "She denied suggestions that the masked man was reviled and beaten like a slave and that he ate food from a dish on the floor like an animal." (*New York Daily News*, July 6, 1963, p. 4, col. 1)
>
> "She agreed and went to the apartment where a naked man was awaiting her in the bedroom. Asked how long it took from the pickup point to the bed, she replied, 'about eight minutes'. ¶"In the apartment she asked where the man was. 'He said he was waiting for me in the bedroom. He gave me a contraceptive and told me to strip'." ¶" 'The man was in bed, naked. There was a hole in the wall where there had been a two-way mirror'." ¶"While Ward made coffee she said. [sic] She had had sexual relations with the waiting man. Then they drank coffee." (*New York Daily News*, July 25, 1963, p. 3, col. 3)

The newspapers in the nation's capital had similar accounts:

> " 'Then,' she said, 'there was a dinner party where a naked man wearing a mask waited on table like a slave. He

(Footnote continued on next page)

Newspaper editorials are to some extent an expression of community standards, and the similarity between the reports and the novel was editorially noted at the same time that a decision holding *Memoirs* not obscene was editorially approved:

> *"Miss Hill, Meet Miss Keeler*
>
> "The State Supreme Court ruling that the 18th-century novel, 'Memoirs of a Woman of Pleasure,' better known as 'Fanny Hill,' is not obscene and cannot be barred from sale in New York was inevitable. The city's Corporation Counsel and District Attorneys only invited trouble when they tried to decide that this (or any other) book is 'obscene.' One reader's obscenity is another's artistry. For a public official to set himself up as a literary critic is censorship. 'Fanny Hill' isn't great literature. By today's standards, it isn't even gamy. We live in a time of open revelation and too often of sordid detail; we would not want to ban a Profumo scandal from the public prints, distasteful as most of its

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had to have a mask because he was so well known.'" (*Washington Evening Star,* June 8, 1963, p. A3)

"In today's hearing, a 19-year-old girl identified as 'Miss X' testified that Ward tried to get her to perform in a bedroom equipped with a peek-through mirror. * * *

"She told him she wasn't interested in watching, but she testified that Ward replied to her: 'Darling, I don't want you to watch, I want you to perform.'" (*Washington Post and Times-Herald,* June 30, 1963, p. A3, cols. 2-4)

"* * * He asked her to go to a party and said he would pay her for it, she said. But instead she was driven to Ward's flat, handed a contraceptive and told to get into bed with a naked man in the next room.

"* * * Sometimes there was a man in bed waiting for her. Sometimes the man asked her to hit him with a cane or a whip—which she did, dressed in her underwear. * * *

"When counsel asked what the going rate would be, she said five pounds ($14) for normal intercourse and one pound ($2.80) a stroke for beating." (*Washington Post and Times-Herald,* July 25, 1963, p. A3, cols. 1-2)

> revelations were. Real-life incidents often exceed fictional ones. Miss Hill, meet Miss Keeler." (*New York Times,* August 24, 1963.)

Appellee says that the average person would be "surprised and probably discomforted" if the subject matter of the book were discussed in public (12). We refer to what is said in our main brief on the differences between reading and less private forms of communication. There is a great deal, in many books that are publicly accepted and highly regarded, which would create embarrassment if it were recited aloud to a public assembly. The situation is altogether inapposite.

Appellee cites the language of the A. L. I. Model Penal Code, which describes prurient interest as a "shameful or morbid interest" (14). But nowhere in his argument on prurient interest does Appellee assert that *Memoirs* is predominantly shameful or morbid. Nor could he. Instead, Appellee speaks in such terms as "highly erotic" (12). What Appellee is saying amounts, at most, to no more than that the book may stimulate a normal sexual response in the reader, and this, as we have urged in our main brief, is not the test of prurient interest. When Appellee states that "The dominant theme of the book is the portrayal in prose of sex and sexual relationships" (14), he is not describing a book whose predominant appeal is to prurient interest. He is merely describing the subject matter of a book, a subject matter that writers are free to deal with (*Roth* v. *United States,* 354 U. S. 476, 487).

Comparing *Memoirs* with other books that have been held not obscene, Appellee offers as a distinction that these other books "contain many passages of real merit, and whole sections having nothing at all to do with sex" (14). Here Appellee is confusing the social value test with the prurient interest test (which he concedes should not be done), and he is asserting the constitutionally invalid notion that what is otherwise prurient is saved from prurience if it is mixed with non-sexual material. The argu-

ment involves the propositions that sexually-exciting objects or descriptions are less exciting in a non-sexual environment, and that repetition of sexual description increases its interest—propositions which experience contradicts. Moreover, it is difficult to see how comparisons with *Tropic of Cancer* and with *Lady Chatterley's Lover* can help Appellee's case. On the contrary, they remind us that Appellee's arguments about the alleged reasons why the "average person" will buy the book have been made before, and rejected.[10] Moreover, these precedents show that no ground for suppression is supplied by Appellee's charge that *Memoirs* describes sexual experiences "in a manner which leaves virtually nothing to even the dullest imagination" (12).[11]

Appellee refers to one who purchases *Memoirs* with "a knowledge of what it is [that is, what Appellee says it is] and the intention to indulge in what is clearly the book's prime attraction" (11). Appellee is apparently interested in protecting the normal adult from indulging in the private sin of reading the book. This, we suggest, is not the business of government. An anti-obscenity statute, limited as it must be by the First Amendment guaranties, cannot be made to serve such purposes. That it should not be made to serve such purposes was recognized long before our Constitution came into being.[12]

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[10] *E.g.*, in the Brief for the Petitioner, page 21, in *Attorney General* v. *Tropic of Cancer*, 345 Mass. 11, 184 N. E. 2d 328.

[11] *Tropic of Cancer*, of course, has been before this Court. As to *Lady Chatterley's Lover*, the degree of detail is certainly not less than that of *Memoirs* (see, for example, pages 207-209 and pages 251-254 of the Grove Press hard-cover edition; pages 228-231 and 269-271 of the paperback edition), and the differences in the style of the two works are such as to bring the reader into much closer contact with the experiences of the characters in *Lady Chatterley's Lover*.

[12] Aquinas, Question XCVI, Second Article, in Pegis, *Basic Writings of St. Thomas Aquinas* (Random House, 1945, Vol. 2, pages 791, 793); Rommen, *In Defense of Natural Law*, in *Law and Philosophy* (New York University Press, 1964, page 111).

Appellee engages in an attempt to explore John Cleland's motives and intent in writing the book (14). Assuming that the determination of the state of mind of John Cleland in 1749 is a plausible subject for judicial inquiry, it is an inquiry that must be deemed irrelevant. What is to be judged is the book that was created, not the situation that may have brought about its creation. Whatever may have been John Cleland's objective, the fact is that he produced a work of art.[13]

Appellee's final point under this heading is that the "average person selects this book because he can find therein material which is unusual, and rarely produced for consumption by the general reading public" (15). For one thing, this is a necessary consequence in each case where a previously suppressed book has been held entitled to publication; formerly forbidden material is made available, and this very fact will create interest. For another, the point that readers are interested in reading about sex is neither news nor a constitutional consideration. The courts that held *Lady Chatterley's Lover* and *Tropic of Cancer* to be within the protection of the First Amendment were as much aware as Appellee that many people would read these books for their sexual interest and the sexual excitement they offered. The unexpurgated *Lady Chatterley's Lover* was published in hard cover by Grove Press, and then, because the book was not in copyright, published in paperback by Dell, by New American Library, by Pocket Books and by Pyramid. Some seven million copies of *Lady Chatterley's Lover* were sold. Over two and a half million copies of *Tropic of Cancer* have now been sold. The judges who decided those cases were not innocent of the possibilities upon which Appellee puts so much stress. The point,

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[13] William Faulkner's introduction to the Modern Library edition of *Sanctuary* (Random House, 1932, 1959) begins:

> "This book was written three years ago. To me it is a cheap idea, because it was deliberately conceived to make money. . . ."

rather, is that these possibilities do not dispose of First Amendment questions. Whether or not we approve of the fact that people look for sexual excitement in what they read, in what they watch on television, in what they see in theatres—the fact exists, and it cannot in itself exclude material from the protection of the First Amendment. If it did, huge areas of art, entertainment and advertising would be subject to censorship, and "the door barring federal and state intrusion into this area" would have to be opened far wider than "the slightest crack necessary" (*Roth* v. *United States,* 354 U. S. 476, 488).

But in any case the interest of the public in material dealing with sex cannot account for the long life of *Memoirs.* As Appellee himself points out, there is a great deal of reading matter available to the public that is devoted to sexual experience. Trash is soon discarded; a book that continues to be read in the third century after its first publication must have other qualities. In the words of V. S. Pritchett, *Memoirs* "has its place in the history of literature, not in the history of smut. Smut never lasts." (R. 28).

Appellee's Point III—Patent Offensiveness

Here Appellee rests his argument on the assertion that "Something is patently offensive when it violates an individual's concept of appropriate behavior" (16). There is no authority for the assertion; certainly *Manual Enterprises* does not provide it. If the narration of matters that violate "an individual's concept of appropriate behavior" constitutes patent offensiveness, then there are very few works of fiction that can pass this constitutional test.

Appellee then says: "This is a test which relates to the sense of propriety and good taste of the average person" (17). We have pointed out in our main brief, in discussing the prurient interest test (at page 13), that the use of an average notion of what is objectionable would impose a

deadening restriction on art and literature—a restriction that the constitutional guaranties do not tolerate. But quite apart from appellee's misuse of the "average person" aspect of the prurient interest test, propriety and good taste are not standards by which the scope of the First Amendment is measured. They are rather, standards of behavior, or standards of literary and artistic criticism. Every one of our media of art or entertainment furnishes frequent instances of impropriety and bad taste—whether in sexual or non-sexual material. A few hours in front of a television set will yield a wealth of documentation. Propriety and good taste, desirable as they may be, do not, under the Constitution, set limits on freedom of expression.

It is something far beyond impropriety and bad taste that *Manual Enterprises* refers to. We respectfully invite the Court's attention to the magazines involved in *Manual Enterprises*, and suggest that the words "propriety" and "good taste" cannot possibly be applied.[14]

Putting together different sections of the brief, it is difficult to determine whether Appellee objects to *Memoirs* because it attracts or because it repels. At times his position is that the descriptions of sexual activities are too alluring (*e.g.*, 9, 11-12, 15); at this point he is saying that they are too repellent.

Appellee argues that "skillful writing" will not avoid the charge of patent offensiveness (17). It is not the general excellence of the writing to which we have drawn attention in this aspect of the matter; it is specifically its elegant and seemly language, the use of periphrasis and metaphor,

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[14] We refer to the Government's description of the magazines, set forth in footnote 13 at 370 U. S. 478, 489, 490. Mr. Justice Harlan's opinion states that the Government's description "tends to emphasize and in some respects overdraw certain features in several of the photographs . . .". It is clear, however, that the material itself was far removed from the area of propriety and good taste. The opinion describes the magazines as "dismally unpleasant, uncouth, and tawdry".

the absence of coarseness and vulgarity. Literary skill may be employed in either direction here. It can be used to make writing deliberately offensive—and a great deal of contemporary literature employs this device.[15] It can also be used to make decorous what might otherwise be rude and offensive, and this is an end to which Cleland devotes his considerable talent. His subject matter is one that most people would not include in social conversation, but this is true of many books, and the concept of patent offensiveness goes to expression, not to underlying subject matter.[16] So far as the patent qualities of the work are concerned, *Memoirs* is the very opposite of offensive.

We agree with Appellee that absence of four-letter words does not in itself control the question, but it is highly relevant. And the grace and elegance of the language of *Memoirs*, its advocacy of the natural and its rejection of the sordid, the fact that it has none of the scatology that is found in *Tropic of Cancer* and many other modern works—all these place the book well outside the field of the patently offensive.

Appellee's Point IV and Conclusion

In Point IV Appellee urges that the *Roth* opinion is "the primary guide in this area" (18), that *Jacobellis* was a "clear reiteration of the standards set forth" in *Roth* (19), that three tests have been developed to determine whether material is obscene (22), and that:

> "The portrayal of sex in and of itself is not sufficient to deny a work First Amendment protection; but hard-core commercial pornography without redeeming importance would not be protected." (20).

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[15] A device not confined to contemporary literature: cf. the works of Jonathan Swift.

[16] Mr. Justice Harlan's opinion cites the portion of the A. L. I. Model Penal Code that refers to "description or representation" (370 U. S. 478, 486).

There is no dispute between the parties on these points. Earlier portions of Appellee's brief show further areas of agreement—on the proposition that the First Amendment protects material unless it is found obscene under each of the tests considered independently (3-6), and on the emphasis that *Jacobellis* gave to the social value test of *Roth* and *Alberts* (6).

There is dispute, however, about the meaning of the *per curiam* reversals that followed *Roth* and *Alberts*. Appellee states that in those reversals "It does not appear that the Court acted in any way upon the question whether the materials were or were not obscene (18)". We submit that the statement is not accurate; it does appear that the Court considered the materials and held them not obscene. In *Jacobellis*, Mr. Justice Brennan wrote:

> "* * * Hence we reaffirm the principle that, in 'obscenity' cases as in all others involving rights derived from the First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected.[6]" (378 U. S. 184, 190).

The footnote appended reads:

> "[6]This is precisely what the Court did in *Times Film Corp.* v. *City of Chicago*, 355 U. S. 35; *One, Inc.*, v. *Olesen*, 355 U. S. 371; and *Sunshine Book Co.* v. *Summerfield*, 355 U. S. 372. * * *"

In the same case, Mr. Justice Stewart wrote:

> "* * * I have reached the conclusion, which I think is confirmed at least by negative implication in the Court's decisions since *Roth* and *Alberts*, that under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. * * *" (378 U. S. 184, 197).

The cases cited by Mr. Justice Stewart in the accompanying footnote are *Times Film; One, Inc.; Sunshine Book;* and *Manual Enterprises.*

Nor is Appellee correct in explaining *Mounce* v. *United States* as turning simply on confession of error. The *per curiam* decision was rendered "*upon consideration of the record and* confession of error by the Solicitor General . . ." (355 U. S. 180; emphasis supplied).

Appellee also discusses the decision of the New York Court of Appeals holding *Memoirs* entitled to constitutional protection (*Larkin* v. *G. P. Putnam's Sons,* 14 N. Y. 2d 399, 200 N. E. 2d 760) (21). Appellee criticizes the majority opinion in that case and recommends the dissenting opinions. The majority opinion, in our view, makes an inadequate appraisal of the value to be found in *Memoirs.* What is significant, however, is that the majority saw sufficient value in the work to bring it within the protection of the First Amendment (14 N. Y. 2d 399, 403, 200 N. E. 2d 760, 762). The opinion, we submit, considerably underestimates the merit of the book. This, however, merely lends emphasis to the court's recognition of the principle that the application of the First Amendment does not depend upon a finding of great value.

The opinion is not analytical, but its conclusions are firm and clear:

> "* * * The Supreme Court has indicated with growing judicial resolution that New York's obscenity statute may not constitutionally be invoked to suppress a book of the standard and content of 'Fanny Hill'.
>
> * * *
>
> "It had become increasingly clear in a long line of decisions which foreshadowed those of June 22 [1964] that State obscenity statutes would no longer afford a constitutionally sound basis for the suppression of a book of the type of 'Fanny Hill'. . . ." (14 N. Y. 2d 399, 404-405, 200 N. E. 2d 760, 763).

The dissenting opinions with which Appellee agrees, and which the majority below found "more persuasive" (R. 124), do not, we submit, support either Appellee's argument here or the conclusion of the majority below. They repre-

sent a repetition of the view that literary or artistic values, no matter how substantial, cannot bring a book within the protection of the First Amendment if, under other criteria, it may be judged obscene. This was Judge Scileppi's view when he spoke for the majority in the *Tropic of Cancer* case (*People* v. *Fritch,* 13 N. Y. 2d 119, 192 N. E. 2d 713) and it remained his view when he came to consider the present book, despite the intervening decisions and opinions of this Court in *Jacobellis* and *Grove Press* v. *Gerstein.* His dissenting opinion in *Larkin* v. *Putnam's* is no more valid than his majority opinion in *People* v. *Fritch;* each represents a refusal to follow what should have been clear from the time of *Roth* and *Alberts*—and was clear to most high state courts that considered the matter[17]—and was made clear beyond question by *Jacobellis* and *Grove Press* v. *Gerstein.*[18]

Indeed, neither the dissenting opinion of Chief Judge Desmond nor the dissenting opinion of Judge Scileppi take the position that *Memoirs* is obscene under the decisions of this Court. Each is not so much a dissent as a protest. They do not state that *Memoirs* can be denied constitutional protection under the standards established by the decisions of this Court; rather they attack those standards, and appeal for a change in the law. Thus Chief Judge Desmond states:

> "* * * Hereafter, pornography no matter how gross (see *Grove Press* v. *Gerstein,* U. S. [June 22, 1964], validating 'Tropic of Cancer') is immune and safe so long as critics praise its writing

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[17] *Attorney General* v. *Tropic of Cancer,* 345 Mass. 11, 184 N. E. 2d 328; *Zeitlin* v. *Arnebergh,* 59 Cal. 2d 901, 383 P. 2d 152, cert. den. 375 U. S. 957; *McCauley* v. *Tropic of Cancer,* 20 Wis. 2d 134, 121 N. W. 2d 545.

[18] The one other high state court that agreed with *People* v. *Fritch*—the Supreme Court of Illinois—acknowledged its error after *Jacobellis* and *Grove Press* v. *Gerstein* were decided: *Chicago* v. *Kimmel,* 31 Ill. 2d 202, 201 N. E. 2d 386; *People* v. *Bruce,* 31 Ill. 2d 459, 202 N. E. 2d 497.

> style and discover 'social significance', whatever that may mean." (14 N. Y. 2d 399, 406, 200 N. E. 2d 760, 764).
>
> "* * * And into the law itself there has come from nowhere a new constitutional theory which licenses the most unrelieved sexual filth either on the theory of 'prevailing community standards' (*Larkin* v. *G. I. Distrs.*, 14 N. Y. 2d , [June 10, 1964]) or on a finding of literary merit or social values (*Grove Press* v. *Gerstein*, supra).* * *" (14 N. Y. 2d 399, 406, 407, 200 N. E. 2d 760, 764).
>
> "I refuse to believe that all this can continue to be the law. I predict that the wheel will turn and the pendulum swing back." (14 N. Y. 2d 399, 407, 200 N. E. 2d 760, 765).

And Judge Scileppi states:

> "The growing tendency to narrow the definition of obscenity and to demand impossible standards makes it virtually impossible to enforce any existing obscenity law or to enact any new legislation which can adequately protect our people from indecent and obscene publications. This is an incredible result which cannot long stand, for an aroused public is sure to bring about a change in the attitude that 'anything goes' in the area of printed material and motion picture productions." (14 N. Y. 2d 399, 408, 200 N. E. 2d 760, 765)[19]

We do not agree that this Court's standards make it "virtually impossible to enforce any existing obscenity law" or that under those standards "anything goes". We believe that history will prove Judge Desmond's prediction wrong, and will confirm the wisdom of this Court's application of the First Amendment to prevent the suppression

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[19] Judge Desmond was also troubled by a companion case in the Court of Appeals which held unconstitutional, as too vague, a New York statute prohibiting sales to minors: *People* v. *Bookcase, Inc.*, 14 N. Y. 2d 409, 201 N. E. 2d 14. Although *Memoirs* was the book involved, the publisher, appellant here, did not participate in that case.

of writing of value. But on the matter of what the law is, the New York Court of Appeals is unanimous; the difference between majority and minority is only on what the law ought to be. All seven judges (Judge Desmond and Judge Scileppi joined in each other's opinion, and Judge Burke joined in both) agree that, under the decisions of this Court, *Memoirs* may not be suppressed.

Appellee argues that unless there is an adjudication of obscenity in the present case, "it is extremely doubtful that the tests may ever successfully be applied to writing which is in novel form" (22). This presents the where-is-the-line-to-be-drawn question with which the law deals in many fields. Here again there are echoes of arguments made against *Tropic of Cancer* and *Lady Chatterley's Lover*. Justice Holmes' famous rejoinder to the citation of *McCulloch* v. *Maryland*—"not . . . while this court sits"—has become the accepted judicial response to arguments of this type.[20] Difficulties of degree and definition are not reasons for denying constitutional freedoms.

But the asserted difficulty is not a real one in the present case. There are books and magazines devoted to sex which, in cover and content, are characterized by a morbidity and a vulgarity that is not found in *Memoirs*. Moreover, they are in no way comparable to *Memoirs* as literature. It is not conceivable that evidence of value such as appears in the present record would be forthcoming with respect to such publications. The Court, as it has said, will consider each case of suppression on its own merits. There is no validity in the argument that a decision on *Memoirs* must necessarily be a holding for every publication "in novel form".

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[20] *Panhandle Oil Co.* v. *Mississippi ex rel. Knox*, 277 U. S. 218, 223.

Appellee states that "a decision by the Supreme Judicial Court to the effect that *Memoirs* is obscene is the first time since the rendering of the *Roth* decision that that Court has concluded that a given piece of writing could constitutionally be suppressed" (22-23). The statement implies that the Supreme Judicial Court regarded *Memoirs* as exceptional. In fact, since the time of *Roth* and *Alberts*, the Supreme Judicial Court had had only two cases in which it considered the alleged obscenity of writing—this and the *Tropic of Cancer* case.

Appellee asserts that the Publisher seeks "to expand First Amendment guaranties ... far beyond what the United States Supreme Court has indicated is the limitation upon those guaranties" (21). On the contrary, we submit, the position of the Publisher, both in our main brief and here, has been based squarely on the decisions of this Court.

Appellee reverts at this point to his earlier argument that *Memoirs* does not have the literary merit of *Ulysses, Lady Chatterley's Lover* and *Tropic of Cancer,* saying that "It cannot be seriously maintained that *Memoirs* ranks with the abovementioned volumes" (21). Here, as elsewhere in his brief, it may be seen that it is Appellee, not the Publisher, who seeks a departure from the standards which this Court has set forth. Appellee would change "utterly without social importance" to read "without the redeeming social importance that may be attributed to the most highly-regarded works".

Appellee construes the Publisher's "Point 6" to mean that the Court should "insulate books completely from the operation of obscenity legislation" (22). This, we submit, is misconstruction. We have urged that different media of expression may be treated differently; that such conflicts as there may be with interests sought to be served by anti-obscenity legislation are less intense where books are concerned, and that books have a special importance for society.

This does not mean that there is nothing in book form upon which anti-obscenity legislation may operate. It does mean that where there are values in a book such as have been demonstrated here, the First Amendment precludes suppression.

Respectfully submitted,

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NOV 2[illegible] 1965

IN THE

Supreme Court of the United [illegible]

October Term, 1965
No. 368

A book named "JOHN CLELAND'S MEMOIRS OF A WOMAN OF PLEASURE", G. P. PUTNAM'S SONS (Intervenor),

Appellant,

vs.

ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS,

Appellee.

On Appeal From the Supreme Judicial Court of Massachusetts.

Motion for Leave to File and Brief Amicus Curiae of Citizens for Decent Literature, Inc., an Ohio Corporation, in Support of Appellee.

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SUBJECT INDEX

Page

Motion for leave to file a brief for Citizens for Decent Literature, Inc., an Ohio Corporation, as Amicus Curiae 1

Brief Amicus Curiae of Citizens for Decent Literature, Inc., an Ohio Corporation, in support of Appellee 3

Interest of Amicus Curiae 3

Statement of the case 5

Attorney General of the Commonwealth of Massachusetts—case in chief 7

G. P. Putnam's sons (Intervenor)—case in chief 9

Summary of argument 26

Argument 30

I.

An integrated review of the obscenity case law 30

A. Public policy 30

B. The problem of previous restraint cases 36

C. The no clear majority decisions 39

D. A major national problem 41

E. A problem of communication 43

F. Reconciling the cases 49

II.

This court should affirm the judgment 52

A. "Fanny Hill"—a "Leveler" of the issues .. 52

B. The common law court's reaction to obscenity and "Fanny Hill" 55

Page

C. Intervenor and other "Fanny Hill" Publishers have "Cleland" attitudes 59

D. The reason for this nation's obscenity laws 66

E. "Fanny Hill" is obscene 70

1. The Roth-Alberts standards 70

(a) General 70

(b) Prurient interest is proscribed 72

(c) Slight social importance does not exculpate 75

(d) Grove Press Inc. v. Gerstein should be abandoned 78

(e) Roth-Standards applied 85

2. History judgments of "Fanny Hill" .. 87

(a) Reputation 87

(b) Judicial opinions 90

Conclusion 96

Appendix. Fanny Hill (by John Cleland) ....App. p. 1

TABLE OF AUTHORITIES CITED

Cases	Page
A Quantity of Books v. Kansas, 378 U.S. 205, 84 S. Ct. 1732, 12 L. Ed. 2d 809	36, 38, 40, 50
Alberts v. California, 354 U.S. 476, 77 S. Ct. 1314, 1 L. Ed. 2d 1498	26, 28, 32, 35, 36, 37, 38, 43, 52, 54, 66, 67, 70, 71, 72, 78, 91
American Civil Liberties Union v. City of Chicago, 3 Ill. 2d 334, 121 N.E. 2d 585	79
Arizona v. Locks, 97 Ariz. 148, 397 P. 2d 949	40
Astore v. United States, 366 U.S. 925, 81 S. Ct. 1352, 6 L. Ed. 2d 384	45
Attorney General v. Tropic of Cancer, 345 Mass. 11	25
Bantam Books Inc. v. Sullivan, 372 U.S. 58, 83 S. Ct. 631, 9 L. Ed. 2d 584 rv'g 176 A. 2d 393	36, 50
Beauharnais v. Illinois, 343 U.S. 250, 72 S. Ct. 725, 96 L. Ed. 919	32
Besig v. United States, 206 F. 2d 142	66
Brownell v. Singer, 347 U.S. 403	38
Butler v. Mich., 352 U.S. 80	44
Cain v. United States, 274 F. 2d 598, cert. den. 362 U.S. 952, 80 S. Ct. 864, 4 L. Ed. 2d 869	44
Chaplinsky v. New Hamphsire, 315 U.S. 568, 86 L. Ed. 1031, 62 S. Ct. 766	31, 32, 76
Chobot v. Wisconsin, 12 Wis. 2d 110, 106 N.W. 2d 286, 368 U.S. 15, 82 S. Ct. 136, 7 L. Ed. 2d 85 reh. den. 368 U.S. 936, 82 S. Ct. 358, 7 L. Ed. 2d 198	43, 45

Page

Collier v. United States, 283 F. 2d 780, cert. den. 365 U.S. 833, 81 S. Ct. 746, 5 L. Ed. 2d 744 ..43, 45

Commonwealth v. Holmes, 17 Mass. 336 .....30, 91

Commonwealth v. Sharpless (1815), 2 S and R 91, 7 Am. Dec. 632 66

Connecticut v. Andrews, 150 Conn. 92, 186 A. 2d 546 48

Dale Book Co. v. Leary, 233 F. Supp. 754 38

Darnell, III v. United States, 316 F. 2d 813, cert. den. 375 U.S. 916, 84 S. Ct. 205, 11 L. Ed. 2d 155 reh. den. 375 U.S. 982, 84 S. Ct. 493, 11 L. Ed. 2d 429 47

Freedman v. Maryland, 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 rv'g 233 Md. 458, 197 A. 2d 232 .....36, 50

Finkelstein et al. v. New York, 229 N.Y.S. 2d 367, 183 N.E. 2d 661 cert. den. 371 U.S. 863, 83 S. Ct. 116, 9 L. Ed. 2d 100 46

Fried v. New York, 238 N.Y.S. 2d 742, rev'd 378 U.S. 578, 84 S. Ct. 1904, 12 L. Ed. 2d 1033 47

G. P. Putnam's Sons v. Calissi, 86 N.J. Super. 82, 97, 205 A. 2d 913 .....84, 95

Goldstein v. Virginia, 372 U.S. 910, 83 S. Ct. 726, 9 L. Ed. 2d 720 .....43, 46

Grove Press Inc. v. Gerstein, 378 U.S. 577, 84 S. Ct. 1909, 12 L. Ed. 2d 1035 ..29, 39, 40, 72, 78, 84

Haddad et al. v. Superior Court of Los Angeles County, 32 Cal. Rptr. 120 61

Hadley v. Arkansas, 205 Ark. 1027, 172 S.W. 2d 237 37

Haldeman v. United States, 340 F. 2d 59 43

Page

Heinecke v. United States, 294 F. 2d 727 cert. den. 368 U.S. 901, 82 S. Ct. 173, 7 L. Ed. 2d 96 ....43, 46

Hochman v. United States, 277 F. 2d 631, cert. den. 364, U. S. 837, 81 S. Ct. 70, 5 L. Ed. 2d 61, reh. den. 364 U.S. 906, 81 S. Ct. 231, 5 L. Ed. 2d 199 .....44, 45

Jacobellis v. Ohio, 378 U.S. 184, 84 S. Ct. 1676, 12 L. Ed. 2d 793 .....40, 43, 49, 67, 68, 71, 78

Kahm v. United States, 300 F. 2d 78, 300 F. 2d 78, cert. den. 369 U.S. 859, 82 S. Ct. 949, 8 L. Ed. 2d 18 46

King v. Commonwealth, 233 S.W. 2d 522 37

Kingsley Book Inc. v. Brown, 354 U.S. 436, 77 S. Ct. 1325, 1 L. Ed. 2d 1469 .....37, 51, 52, 74, 84

Kingsley International Pictures, Inc. v. Regents, 360 U.S. 684, 79 S. Ct. 1362, 3 L. Ed. 2d 1512 68

Larkin v. G. I. Distributors Inc., 14 N.Y. 2d 869 .. 39

Larkin v. G. P. Putnam's Sons, 14 N.Y. 2d 399, 252 N.Y.S. 2d 71 .....39, 91, 95

Manual Enterprises Inc. v. Day, 370 U.S. 478, 82 S. Ct. 1432, 8 L. Ed. 2d 639 ..36, 38, 39, 40, 50, 72

Marcus v. Kansas City Search Warrants, 367 U.S. 717, 81 S. Ct. 1708, 6 L. Ed. 2d 1127 rv'g 344 S.W. 2d 119 .....36, 50

Matthews v. Florida, 356 U.S. 918, 78 S. Ct. 702, 2 L. Ed. 2d 714 44

Mishkin v. United States, 317 F. 2d 634, cert. den. 375 U.S. 827, 84 S. Ct. 71, 11 L. Ed. 2d 60 46

Missouri v. Becker, 364 Mo. 1079, 272 S.W. 2d 283.. 37

Page

Missouri v. Vollmar, 389 S.W. 2d 20 38

Monfred et al. v. Maryland, 226 Md. 312, 173 A. 2d 173 cert. den. 368 U.S. 953, 82 S. Ct. 395, 7 L. Ed. 2d 386 .....43, 45, 46

Mounce v. United States, 355 U.S. 180, 2 L. Ed. 2d 187, rv'g 247 F. 2d 148, 134 F. Supp. 490 36

Near v. Minnesota, 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 .....26, 31, 32, 36, 51

Nebraska v. Jungclaus, 176 Neb. 641, 126 N.W. 2d 858 38

New York v. Harry Fried, 18 A. 2d 996, 238 N.Y.S. 2d 742 42

New York v. Ray Kirk, Birch, All State News Co. Inc., et al., 40 Misc. 2d 626, 243 N.YS. 2d 525 42

New York v. Richmond County News Co., 175 N.E. 2d 681 38

Oakley v. United States, 290 F. 2d 517, cert. den. 368 U.S. 888, 82 S. Ct. 139, 7 L. Ed. 2d 87 reh. den. 368 U.S. 936, 82 S. Ct. 358, 7 L. Ed. 2d 198 .....43, 45

One Inc. v. Olesen, 355 U.S. 371, 78 S. Ct. 364, 2 L. Ed. 2d 352 rv'g 241 F. 2d 772 36

Outdoor American Corporation v. City of Philadelphia, 333 F. 2d 1963, cert. den. 85 S. Ct. 192, 13 L. Ed. 2d 176 37

Padell v. United States, 262 F. 2d 357, cert. den. 359 U.S. 942, 79 S. Ct. 723, 3 L. Ed. 2d 676 44

Parr v. United States, 255 F. 2d 86, cert. den. 358 U.S. 824, 79 S. Ct. 40, 3 L. Ed. 2d 64 44

People v. Fritch, 13 N.Y. 2d 119 .....25, 26, 39, 84

Page

People v. The Bookcase Inc. et al., 14 N.Y. 2d 409 .. 39

People v. The Bookcase Inc., 40 Misc. 2d 796, 244 N.Y.S. 2d 297 84

Putnam & Sons v. Lancer Books, Inc., 239 F. Supp. 782 60

Regina v. Reid (1708), 11 Mod. Rep. 142 57

Rex v. Curl (1927), 2 Strange 788 ....58, 66, 72, 75 .....84, 85, 91, 94

Rosen v. United States, 161 U.S. 606 .....30, 32

Roth v. United States, 354 U.S. 476, 77 S. Ct. 1314, 1 L. Ed. 2d 1498 .....26, 28, 32, 35, 36, 37, 38 .....43, 52, 54, 66, 67, 70, 71, 72, 76, 78, 84, 87, 91

Sunshine Book Co. v. Summerfield, 355 U.S. 372, 78 S. Ct. 365, 2 L. Ed. 2d 352 rv'g 249 F. 2d 114, 128 F. Supp. 564 36

Times Film Corporation v. City of Chicago, 355 U.S. 35, 78 S. Ct. 115, 2 L. Ed. 2d 72 rv'g 244 F. 2d 432, 139 F. Supp. 837 36

Times Film Corp. v. City of Chicago, 365 U.S. 43, 81 S. Ct. 391, 5 L. Ed. 2d 403 rv'g 272 F. 2d 90, 180 F. Supp. 843 36

Tralins v. Gerstein, 378 U.S. 576, 84 S. Ct. 1903, 12 L. Ed. 2d 1033 .....40, 72

Trans-Lux Distributing Corp. v. Board of Regents of the University of New York, 380 U.S. 259, 85 S. Ct. 952, 13 L. Ed. 2d 959 rv'g 14 N.Y. 2d 88, 248 N.Y.S. 2d 857 .....36, 51

United States v. Kennerley, 209 Fed. 119 74

United States v. Klaw and Jack Kramer, 350 F. 2d 155 43

United States v. Levine, 83 F. 2d 156 74

Page

Volanski v. United States, 246 F. 2d 842 74

Wenzler and Imlay v. California, 377 U.S. 994, 84 S. Ct. 1902, 12 L. Ed. 2d 1047, reh. den. 85 S. Ct. 14, 13 L. Ed. 2d 77 .....43, 47, 48

Williamson v. California, 207 Cal. App. 2d 839, 24 Cal. Rptr. 734, cert. den. 377 U.S. 994, 84 S. Ct. 1902, 12 L. Ed. 2d 1047, reh. den. 85 S. Ct. 13, 13 L. Ed. 2d 77 47

Womack v. United States, 294 F. 2d 204, cert. den. 365 U.S. 859, 81 S. Ct. 826, 5 L. Ed. 2d 822 ....43, 45, 46

Zeitlin v. Arnebergh, 59 Cal. 2d 901, 31 Cal. Rptr. 800 .....39, 63, 81

Zeitlin v. Arnebergh, 375 U.S. 957 64

Zucker v. New York, 371 U.S. 863, 83 S. Ct. 116, 9 L. Ed. 2d 100 46

Zuideveld v. United States, 316 F. 2d 873, cert. den. 376 U.S. 916, 84 S. Ct. 671, 11 L. Ed. 2d 612 47

Dictionary

Webster's Collegiate Dictionary, Fifth Edition 30

Statutes

General Laws of Massachusetts, Chap. 272, Sec. 28B 5

General Laws of Massachusetts, Chap. 272, Sec. 28 C 5, 25

General Laws of Massachusetts, Chap. 272, Sec. 28 C-H 5

General Laws of Massachusetts, Chap. 272, Sec. 28-D 5

Page

General Laws of Massachusetts, Chap. 272, Sec. 28-E 25

General Laws of Massachusetts, Chap. 272, Sec. 28-F 5, 25

United States Constitution, First Amendment 4, 6, 25, 74, 75

United States Constitution, Fourteenth Amendment 6, 90, 91

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Page

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IN THE

Supreme Court of the United States

October Term, 1965
No. 368

A book named "JOHN CLELAND'S MEMOIRS OF A WOMAN OF PLEASURE", G. P. PUTNAM'S SONS (Intervenor),

Appellant,

vs.

ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS,

Appellee.

On Appeal From the Supreme Judicial Court of Massachusetts.

Motion for Leave to File a Brief for Citizens for Decent Literature, Inc., an Ohio Corporation, as Amicus Curiae.

Citizens for Decent Literature, Inc., an Ohio Corporation respectfully moves for leave to file a brief as *amicus curiae* in support of the Appellee in this case. The consent of the Attorney General of the Commonwealth of Massachusetts has been obtained, and has been filed with this court. The consent of Charles Rembar, for G. P. Putnam's Sons (Intervenor), was requested by letter dated November 13, 1965, but no response to this request has been received.

Probable jurisdiction was noted on November 8, 1965, at which time the case was placed on the summary calendar for argument with Ralph Ginzburg *et al.* v. United States, October Term, 1965, No. 42 and Edward Mishkin v. State of New York, October Term, 1965. No. 49 during the second week in December. The acceleration in the hearing of this matter made a more timely filing impossible.

The interest of Citizens for Decent Literature Inc. is more fully set forth in the accompanying brief.

Respectfully submitted,

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IN THE

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On Appeal From the Supreme Judicial Court of Massachusetts.

Brief Amicus Curiae of Citizens for Decent Literature, Inc., an Ohio Corporation, in Support of Appellee.

Interest of Amicus Curiae.

Citizens for Decent Literature, Inc., an Ohio Corporation, with local affiliates throughout the United States is a non-profit, non-sectarian and non-political corporation with national headquarters in Cincinnati, Ohio, formed for and dedicated to the cause of good, decent and wholesome literature with a view to oppose and eliminate obscene literature. by cooperating with law en-

forcement in the enforcement of the laws. For the Court's convenience *amicus curiae* is hereinafter referred to by the single short title, CDL.

CDL believes that there exists a growing flood of publications, purposely designed and manufactured with a sensationalized appeal to prurient interest, that threatens to overthrow the basic morality upon which our nation and our Constitution were founded; that while the First Amendment of our Constitution has, from the time of our nation's founding, been construed to afford no protection to such publications, a loud voice is now being heard in the courtroom advocating the overruling of this "balancing of interest" interpretation in favor of an absolutist approach, aimed at nullifying the nation's basic obscenity laws.

At its national convention in Chicago during October of 1963, the national organization of Citizens for Decent Literature adopted a policy aimed at giving increased support in the fight against "obscenity," through legal advocacy in the courtroom in support of the people's case.

A Book Named "John Cleland's Memoirs of a Woman of Pleasure", G. P. Putnam's Sons (Intervenor) vs. Attorney General of the Commonwealth of Massachusetts is a case of nationwide importance which will have a serious effect on enforcement of the obscenity statutes throughout the nation.

Statement of the Case.

On February 10, 1964, Edward W. Brooke, Attorney General of the State of Massachusetts, filed a petition in the Superior Court of Suffolk County under the provisions of Section 28 C of Chapter 272* of the General Laws of Massachusetts alleging that there was probable cause to believe that an obscene paperback book named "John Cleland's Memoirs of a Woman of Pleasure" (commonly known as Fanny Hill) was being imported, sold, etc., in the Commonwealth. The petition further alleged that the publisher** and copyright holder was G. P. Putnam's Sons of the City of New York.

On the same date, Justice Eugene A. Hudson of the Superior Court filed a statement indicating that, after reading and studying its entire contents, he was of the opinion that there was reasonable cause to believe the

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*Section 28 C-H were enacted into law as part of Chapter 272 in 1945 as an ancillary proceeding to Section 28B thereof which provides a criminal penalty of up to five years in the state prison or not more than two and one-half years in the House of Correction and/or a fine of not less than $100 nor more than $5,000 for dealing in obscenity. Section 28D provides in part that "Any person interested . . . may claim a right to trial by jury on the issue whether said book is obscene . . ." Section 28F provides in part "At such hearing the court may receive the testimony of experts and may receive evidence as to the literary, cultural or educational character of said book and as to the manner and form of its publication, advertisement, and distribution. . . ."

**The publishers of Fanny Hill are legion. Until the recent decisions of this Court the overwhelming majority preferred to remain anonymous. Some (but not all) of the modern competitors of G. P. Putnam & Son are: Brandon House (P. 901), owned by Milton Luros, 7311 Fulton St., Los Angeles, California, also a publisher of girlie magazines, nudist magazines and sex (predominantly Lesbian type) paperbacks; All Star (AS 10) owned by Edwin A. Schnepf, of 10539 Burbank Blvd., Los Angeles, California, also a publisher of girlie magazines, nudist magazines and sex tabloids and sex paperback books, and Fitz Publishing Company, Los Angeles, California, distributed nationally by Golden State News (GSN), owned by a publisher and distributor of girlie magazines, nudist magazines, and sex paperback books.

book to be obscene. He entered an interlocutory finding and adjudication to that effect and ordered publication of a notice to show cause why such book should not be judicially declared to be obscene, and transmission of the same by registered mail to the publisher and copyright holder in New York City.

On the return date, March 19, 1964, G. P. Putnam's Sons filed an answer to the petition, as an intervenor, admitting it was the publisher and copyright holder, the sale and distribution in the Commonwealth, but denying that the book was obscene and alleging affirmatively that the same was protected by the First Amendment to the United States Constitution, as applied to the states by the Fourteenth Amendment.

Neither party "claimed" a jury as authorized by Section 28 D.

On April 16, 1964, an order was entered setting the matter for hearing on May 27, 1964, without jury. The case was tried before Superior Court Justice Donald M. Macaulay, on May 27, 1964.

During its case in chief, a copy of the paperback book "Fanny Hill, John Cleland's Memoirs of a Woman of Pleasure" was introduced by stipulation. The Attorney General called one literary person as a witness, Dr. John E. Collins, Headmaster of the Newman Preparatory School.

During its case in chief, intervenor introduced documentary evidence in the form of book reviews, essays and newspaper and magazine articles. The publisher's President Mr. Minton, and five persons in the literary field testified as witnesses: Fred Holly Stocking, Professor of English and Chairman of English Department,

Williams College, John N. Bullitt, Professor of English and Master of Quincy House, Harvard College, Robert H. Sproat, Associate Professor of English Literature, Boston College, Norman N. Holland, Associate Professor of English, Massachusetts, Institute of Technology and Ira Konigsberg, Assistant Professor of English and American Literature, Brandeis University.

Attorney General of the Commonwealth of Massachusetts—Case in Chief.

A copy of G. P. Putnam's Son's paperback book entitled "Fanny Hill, John Cleland's Memoirs of a Woman of Pleasure" was admitted into evidence as Exhibit A.

John E. Collins, the headmaster of Newman Preparatory School, testified to his educational background and experience. He received a Bachelor of Arts degree from Boston College in 1925, a Master of Arts degree from Boston University in 1926, and a Doctor of Philosophy degree from Boston College in 1936. He did graduate work at Harvard and Oxford. He taught at Boston Latin School for 22 years, was head of the English Department at the State College at Boston for 16 years and Academic Dean and Dean of the Graduate School until February 1, 1964, when he became headmaster of Newman Preparatory School. His area was English literature. He had lectured and had prepared and contributed articles [R. 10].

Dr. Collins testified that he had read Fanny Hill and that in his opinion the book was "obscene" and "indecent" [R. 11]. In his subjective opinion the book "unconditionally" would arouse prurient interest in a reader [R. 13]. The book "lacks literary merit" [R. 13] and, judging the book from the point of view of a

human document, he could not "find that it had any social significance nor any literary style that might lift it up beyond pornography" [R. 13]. In his opinion the book was "pornographic" [R. 14], "hard-core pornography", "offensive" [R. 14] and "patently offensive" [R. 15].

On cross-examination by the intervenor's attorney, Mr. Rembar, Dr. Collins stated that he was familiar with the English novels of the 18th Century and taught courses on the English novel, comparative study of the novel, contemporary novel, Shakespeare, a course in biography and others [R. 16]. He understood the word "prurient" to mean "dirty", "sexual", "erotic" and "for the purpose of stimulating sexual reactions" [R. 16]. Zola's "Nana" was an example of a book that he would regard as "predominantly erotic" but which he would not regard as "predominantly prurient" because it had literary merit which "lifts it up above and beyond the word 'prurient' " and was a "human document" [R. 17]. He understood the word "obscene" to mean "disgusting" as confined to books that deal with sexual subject matter [R. 18]. He understood the word "indecent" to mean "contrary to public mores, to the customs of the people and the common standards of a given time and a given place" [R. 19]. In reference to the phrase "patently offensive" he understood "patently" to mean "openly" [R. 19]. In his opinion Tropic of Cancer was patently offensive, indecent, appealed to prurient interest and was obscene [R. 19].

The court sustained an objection to the question of intervenor's attorney whether Dr. Collins agreed with a certain book review in the New York Sunday Times Book Review Section. The court ruled that such was

hearsay and, if admitted, would let into evidence the opinion of another witness not under oath [R. 22].

Intervenor's attorney made an offer of proof on four exhibits: Exhibit 1, a review of "Speaking of Books" by J. Donald Adams in the New York Times Book Review, dated July 28, 1963; Exhibit 2, an article entitled "The Harlot's Progress" by V. S. Pritchett, contained in the October 31, 1963 edition of the New York Review of Books; Exhibit 3, an article entitled "Mersey Sound, 1750" by Brigid Brophy, from the November 15, 1963 edition of "New Statemen"; and Exhibit 4, an item bearing the subheading "Taste" under the heading "Modern Living" from the August 2, 1963 edition of Time Magazine. The offers of proof were excluded on the grounds that such exhibits were inadmissible as hearsay, being opinions of persons not in court for cross-examination [R. 22-40].

The Attorney General of the Commonwealth of Massachusetts rested his case [R. 40].

G. P. Putnam's Sons (Intervenor)—Case in Chief.

Fred Holly Stocking, Professor of English and Chairman of the English Department, Williams College, Williamstown, Mass., testified to his educational background and experience. He had been teaching English since 1937 and had taught a wide range of English literature from Chaucer to the 1930's [R. 41-42].

Mr. Stocking testified that he was familiar with the book in issue and that in his opinion it had literary merit because it "is a work of art. That is to say, I think it asks for and receives a literary response as distinct from a non-literary response." [R. 42]. It was "an act of contemplation presented through a story that is

presented in an orderly and organized fashion, with a fictional central character, and with a literary style that is definable and commendable. I think the central character is presented as a person who, at the time of writing these words, is essentially what I call an intellectual. By an intellectual, I mean someone who is extremely curious about life and who seeks with objectivity and detachment to record with accuracy the details of the external world, physical sensations, psychological responses . . ." [R. 42]. In his opinion, the character was essentially "an empiricist who does arrive at certain conclusions, certain conclusions about moral values, certain conclusions about the nature and high value of temperance, certain conclusions about the value of the life of the mind, who arrives at a clear intellectual distinction between the nature of love and the nature of lust." [R. 43].

Mr. Stocking testified that the "intellectuality of this character" was made clear to him by the prose style, which "is ceremonious, formal, consciously formed, and in a way that I find pleasurable and highly artificial. This establishes the air of detachment from the beginning." In his opinion it was "extraordinary" that a man could project himself into the mind of a woman "in as precise and vivid a way" as Cleland had [R. 43].

In Mr. Stocking's opinion, the book was a structured novel which "offers that kind of vicarious experience and the conclusions one can derive from vicarious experience which one cannot derive from one's own experience. . . ." [R. 43].

It told him things about human nature and the 18th Century that he might not otherwise have known [R. 43].

On cross-examination by the Assistant Attorney General, Mr. Sullivan, Mr. Stocking testified that he got his BA from Williams College and his MA and Ph.D in English from the University of Michigan. He had been at Williams since 1940 as a member of the faculty [R. 44]. Mr. Stocking said that he understood "there is a passage that the editors believed a later publisher inserted and therefore was not written by Cleland, but does occur in some 18th Century editions of this book." [R. 47]. The passage referred to the homosexual episode.

On cross-examination Mr. Stocking testified that in his opinion the description of the depravities, such as homosexuality and lesbianism were "not obscene because they are subordinate to an interest which is primarily literary, whereas an obscene piece of literature has an interest which is primarily to arouse sexual passion in the reader." Individual passages in the book "do of course" give rise to sexual passions in the reader [R. 49]. Asked percentage-wise "what proportion of this book is devoted to depicting sexual relations of one kind or another" he answered, "My guess would be less than half" [R. 51]. Asked if the depicting of these sexual relations, intercourse, homosexuality, lesbianism, or depravity, as presented in the book, aroused prurient interest in the reader, he said "The answer is no. That is not the chief—"; later, that he could not "give a Yes or No because it arouses many interests, of which a prurient is—"; later, that he could not give a Yes or No answer [R. 51-52].

On re-direct examination by intervenor's attorney he testified that his impression of the book as a whole was that "It is essentially trying to be, and is successful in

being, a literary work, that is to say, a piece of writing that intends to and succeeds in evoking a literary response." [R. 53].

John M. Bullitt, Professor of English at Harvard and Master of Quincy House, testified to his experience. The 18th Century was his specialty in the field of English [R. 53].

Mr. Bullitt testified that he had read the book in issue and was of the opinion that it had "detectable literary merit and considerable historical value" [R. 53]. Though not "a great work of art by any means" it was "recognizable as an effort to interpret a rather complex character living in a world peopled by highly diversified characters, going through a number of very different situations. There is evidence, it seems to me, here of a rather skillful, not greatly skillful, but rather skillful effort to construct a recognizable plot with a purpose behind it." [R. 54].

Mr. Bullitt testified that the book "has a good deal of interest as it relates to a number of other books in the 18th Century which are concerned with some of the same themes, some of the same points of view." like Henry Fielding's Joseph Andrews and Richardson's Clarissa and Pamela. The moral structure of the theme Cleland resolves "in a way which is customary among his contemporaries in the 1740's, namely, although she asserts very strongly throughout the novel the value, the importance, of sexual pleasure, she at the same time learns, and the sense of the novel can be construed as the education of a young woman in a moral life, the value of love" [R. 55]. "Here she asserts during those last pages at some length the whole idea that a

sensual passion is only truly experienced when it is associated with the emotion of love. . . ." [R. 55].

Mr. Bullitt was of the opinion that there was a good deal of deliberate, calculated comedy in the novel "For example, the metaphoric structure which Fanny uses when she describes her seduction, if I may use that word, by the sailor, is nautical." [R. 55]. The deliberate, calculated use of the metaphore is amusing [R. 56].

Mr. Bullitt testified that a "second aspect of the book" "that might bear emphasis is the way in which Cleland follows a tradition of descriptive characterization. It may not be an accident that she takes the name "Fanny". It may be that Cleland clearly had the adventures of Joseph Andrews, by Henry Fielding, in mind." [R. 56]. He cited the characterizations of Ester Davis, who brought Fanny to London, "about 46 years old, tall, meager, red haired, with one of those trivial, ordinary faces you meet with everywhere and go about unheeded, unmentioned . . ." and Phoebe, the prostitute, who is "red faced, fat and in her early 50's, who waddles into a room" as instances of the treatment and development of character that is typical of the novel as a literary form. They are "very careful, exuberantly done charterizations" "There is a rather careful effort here to delineate this person." "This kind of writing is very skillfully done. It is a mark of an artist" [R. 57].

On cross-examination by the Assistant Attorney General, Mr. Bullitt stated that there was considerable sensual delight in the book, and that there were phrases which depicted depraved sexual relations [R. 58]. He admitted that "So far as I can recall, every character in the book has, at some time or other, some relation

to sexual activity" [R. 59]. Asked concerning the purpose behind the novel which he referred to on direct examination, he replied that one purpose of the book is "to write a novel that is going to be of interest to his readers. That is perfectly clear. Beyond that, he does have an idea to present—a purpose in that sense. He is communicating." [R. 59].

Asked if he believed if the average reader in the community to whom the book would become available would have aroused in him or her prurient interest, he answered "Your Honor, do I have to answer that yes or no when I find it very difficult? I am no sociologist, your Honor; I am a professor of English. . . . I am not a sexologist; I am not a professional in this matter." [R. 61]; later, "I think it is possible, but I find it incapable, honestly, to be certain." [R. 62]. Asked "Is the book obscene in your opinion" he replied, "I have no opinion on obscenity". Asked if he had an opinion on offensiveness, he replied "yes" and that he felt it was not offensive [R. 62].

On re-direct examination by intervenor's attorney, Mr. Bullitt was asked the reaction of the reader to the homosexual description in Fanny. He replied that in his opinion the readers "are somewhat influenced by Fanny's own response. Fanny's response is disgust, horror, indignation. She explains very carefully that the only reason she sees the scene to its conclusion is not for any pleasure that she receives in voyeurism, but rather so that she can document the facts so that she can go and get help and to have the people arrested. This is the reason why she hurries so rapidly, catches her foot on a nail, falls, is knocked unconscious; they hear her and they escape." [R. 62-63].

On re-cross-examination by the Assistant Attorney General, he was asked if he would use this type of language over the breakfast table with his wife and he replied, "Yes, indeed, indeed.", and "There isn't a single dirty word in this book." [R. 63].

Robert H. Sproat, Associate Professor of English literature, Boston University, testified to his experience. He had been a member of the faculty at Boston University for approximately 17 years [R. 63].

Mr. Sproat testified that he had read the book which was before the court. In his opinion the book had very definite literary merit and as such had social value. It was a work of art, having an interesting structure "fundamentally in three parts. It bears upon the development of the character of the heroine." "The first part, up to her meeting with Charles; the second with her experience with, I think it is Mr. H; and then, finally her salvation in love with Charles. I think each of these sections is intricately or organically related to the character of Fanny, to help develop the heroine's final moral and philosophical values. Now, they aren't very great, I will admit that—they are not profound, but they are legitimate values, and they are positive values." Asked "What are those values?" He replied, "I think that, at the risk of oversimplification, she finds that love, that sex without love, with love, is a good thing." . . . "Cleland is dealing with the opposition in the novel between sex without love and sex with love." In his opinion the character of Fanny belonged to the minor classic heroines, falling between James Joyce's Molly and Moll Flanders [R. 64].

Mr. Sproat testified that one aspect he found interesting about the work was "the language functions

in his novel to create a distance, even when the sexual experiences are portrayed, and, I will admit, they are portrayed in detail. That one's response to those scenes is a literary response has been brought out by a previous witness." "One's response is, in part or, as it is in any work of art, both to what is being said and how it is said at the same time. Very often, I think that this is a saving grace, for many of the scenes, translated into language of the present, realistic, naturalistic, in the language of the realistic, naturalistic novel could be quite offensive. But I find it not offensive." In his opinion passages in John Updike's "Rabbit Run" and James Baldwin's were just as explicit, if not even more explicit than in Fanny Hill. Mary McCarthy approaches it in a more clinical and less enjoyable way than John Cleland [R. 65].

In answer to the Court's question whether he found books with as many repetitive sexual experiences as this book, Mr. Sproat answered, ". . . in a quantitive court, I would say no, probably." "The episodic nature of the 18th Century novel which often belongs to the genre, makes it almost inevitable that one will have a repetition of the same sort of thing over again." [R. 65].

Mr. Sproat stated that he found the "style itself, the words, the language, the metaphore" "amazing". The metaphore rescues—put it this way, the language transmutes what might have been, what could be a brutal or raw and directly expressed vulgar situation into something literary" [R. 66].

On cross-examination by the Assistant Attorney General, Mr. Sproat stated that he did not find Fanny Hill "vulgar" or "offensive." It was "not great", was "not profound" but had "some value" [R. 66]. The homo-

sexual scene could not, in his opinion, be omitted because "it further developes the character of Fanny" [R. 67]. It was "a minor work of art." [R. 68]. Asked if he thought the book obscene, he answered "If I should answer that—may I ask a question? If I say No, I don't want to be forced to define 'obscene' because I am not sure what you are getting at, but I do not think that— . . . I do not find the book offensive. I do not find the book offensive. I find it erotic." In answer to the question, "Do you feel that the book arouses prurient interest in the reader," he said, "I do feel that I cannot judge. I am not qualified to judge this matter. This is a matter for a sociologist." As he recalled, all of the characters have some relationship to the depicting of a sexual relationship of some sort [R. 68]. In answer to the question, "If we were to remove all the sexual relations out of this book, how much of the book will we have left, proportionately?" he replied, "I would disagree with the former witness who said it was less than 50 per cent of the book that deals with sexual matters." [R. 69].

On re-direct examination, he was asked if the moral value which he testified he found in the book that "sex with love is a good thing" was the only value he found, he stated, "Oh, no. I mean that this was value in the sense of a theme in the book—one of the themes, the development of the character, the structure of the plot, the setting, the style, and so forth and so on. There are other themes, in other words, in the novel. This is one of themes." [R. 70].

Norman N. Holland, Associate Professor of English at M.I.T. testified to his experience. He had been teaching English literature 11 years, two years as a

teaching fellow and 9 years full-time teaching [R. 70-71].

Mr. Holland testified that he had read the book and was of the opinion it has "literary merit and it has other values" [R. 71].

He found it "extremely interesting from the point of view of a literary historian, essentially as a record of the historical, psychological, social events of the period." Cleland occupied an interesting part in the novel of 1748 and its transition from epistolary form to a more straight-forward narrative technique. The descriptions of clothes, prices, customs, the theme of inherited wealth [R. 71] the "insight into the awakening of a woman, into the sexual act, both its normal and its perverted forms", the "sexual tastes of the 18th Century" such as the tendency away from nakedness during the sex act were "an interesting sort of sociological observation" [R. 72].

Mr. Holland testified that in terms of literary merit, he would place Fanny Hill below the works of Fielding's, Joseph Andrews and Tom Jones and above Defoe's Moll Flanders, "which makes it, I would say, not a great novel but certainly a rather good one." In terms of value of a novel, "we would ask that the style and the content work together to create a meaningful expression," [R. 72]. As to the novel's style, the technical term is "pariphrasis" but essentially what is meant is, a spade is not called a spade. "It is masking over the events described by different kinds of metaphores and figures of speech, as, for example, when she is in her encounter with a sailor, she slips into nautical figures of speech. She refers constantly to the male sexual organ as an engine, this kind of thing, which is

pulling you away from the way these events would be described in the 19th or 20th Century." [R. 72]. He thought the style was "a sense of masking over the events described" "Cleland is using the various sexual acts in the novel to trace the moral progress of his heroine". He thought that the sexual content of the novel is part and parcel of the theme and would agree that the theme of the novel in a simplified form, is that sex with love is a good thing, morally, psychologically" [R. 73].

Mr. Holland testified that he found two observations of people's human behavior which were of interest to him. One was the awakening of Fanny as a woman to a woman's mature sexuality, as to which he thought Cleland had considerable insight. The other was the treatment of the masochist, in that Cleland presented the pain as a prepayment for his own guilt which he received out of the pleasure of the sexual relationship, a view of masochism he thought extraordinary in the year 1748 [R. 74].

On cross-examination by the Assistant Attorney General, Mr. Holland stated that he found "A good deal" of "Sexuality, the sexual drive" in the book [R. 74]. The term "engine" and "machine" used for the male sex organ [R. 75] was quite specifically described, but it was in "this funny 18th Century language" [R. 76]. The trial judge commented, "I think I understand a description whether given in the 18th Century or not." Asked if he would use the type of language that is used in the book over the breakfast table with his wife, he replied that he would if he were "so skilled to speak it" [R. 77].

On re-direct examination by the intervenor's attorney, he stated that it had never been thought to be a literary requirement that a novel deal with all aspects of life and the fact that a novel deals with only one aspect of life would not deprive it of its quality of a work of art [R. 78].

Intervenor's attorney offered in evidence Exhibits B through I (Copies of newspapers, and a copy of Life Magazine, dealing with the treatment of the Profumo-Ward scandals in England in June and July of 1963) as bearing on the issue of contemporary community standards [R. 78] *i.e.*, what the general public was reading at about the time Fanny Hill was published by Intervenors in September and October of 1963. The court admitted the exhibits noting, "Just a cursory reading of them indicates that these late events are quite different than those detailed in the book" [R. 81].

Walter Minton, President of G. P. Putnam's & Sons testified that his company had been publishing books since 1838 and that he had been president for 9 years. In its earlier history the company had published some of the writers of the New York school including Washington Irving, James Fenimore Cooper, Edgar Allan Poe; Herman Melville. In more recent years they have published Sholem Asch, Vladimir Nabakov and Pearl Buck [R. 82].

Putnam's & Sons had received a considerable number of orders for the book from colleges and libraries. They had received two communications from the Library of Congress, one requesting the copy of the book which they had failed to file for copyright purposes; the other, a request to translate the book into Braille, "which the

Library of Congress does with a number of books it deems of general interest" [R. 83].

Mr. Minton testified that the book was distributed through the ordinary channels of distribution that Putnam's employed for its lists generally; through normal bookstore accounts and wholesalers who service smaller bookstores as well as supplying public and college libraries [R. 84].

Ira Konigsberg, Assistant Professor of English and American literature at Brandeis University, Waltham, testified to his experience. He had been teaching literature for 9 years and specialized in the 18th Century novel. He was finishing a book that deals with the 18th Century novel from 1700 through 1740 [R. 84].

Mr. Konigsberg testified that he had read the book and was of the opinion that "it is an extremely significant literary work". He based his opinion on three standards: It's significance as a literary document for a modern day reader, its significance in the history of English literature, and its significance in terms of the moral values that a literary work can advocate [R. 85].

Mr Konigsberg testified that in terms of its literary value for the contemporary reader it was a novel that fulfilled the requirements of serious literature. It "attempts to create an illusion of reality for the reader through the creation of realistic characters, realistically portrayed in a semi-credible or realistic situation" and "the various episodes, the chapters, are all unified together for one specific end, and that is the writing of a complete work of art itself." [R. 85].

Mr. Konigsberg testified that in terms of its historical importance, its publication in 1749 was "extremely

significant", "With Fielding's work 'Tom Jones' Cleland's 'Memoirs of a Woman of Pleasure' is a very specific reaction to a kind of literature that was published at the time, that is, the novels, in particular, of Samuel Richardson." [R. 85]. "Richardson believed that chastity was the most important thing in the world; Cleland and Fielding obviously did not and thought there were more important significant moral values." [R. 86]. "to sum up this point," Fanny Hill was of historical importance because it "tells us about a cultural conflict in the 18th Century", "tells us something about the literary plots and character types that were being used" [R. 86] and "tells us something about the development of the English novel as a literary form" which "cannot be emphasized enough" since before 1740 "there is simply no modern English novel". "Cleland is right there at the beginning, and his work is extremely significant in this way" [R. 97]. Cleland's prose style makes him a remarkable "literary stylist of the novel" In his opinion, "Cleland is not one of the six major novelists of the period, but he is significantly better than the rest of the minor figures." [R. 88].

Mr. Konigsberg testified that it was an important literary book because it made a serious statement about life and experience [R. 88].

Mr. Konigsberg stated that the Commonwealth period of extreme expression of freedom of life in 17th Century England was followed by the reactionary Restoration period which was an excessive kind of libertine life and excessive sexual freedom. This in turn was followed by the significant middle-class reaction at the beginning of the 18th Century, of which Richardson, Fielding and Cleland were a part, which had a Puritanical emphasis

upon chastity. In his opinion Fielding and Cleland were "trying to advocate a more wholesome view of life itself and the relationship between the sexes" in reaction to what Richardson was doing [R. 89].

Asked to compare the attitude toward sex in Cleland's book with the same attitude as reflected in a good many contemporary novels such as James Baldwin's "Giovanni's Room", John Updike's "Run Rabbit Run," Mary McCarthy's "The Group", Norman Mailer's "The Naked and the Dead" and James Jones' "From Here to Eternity" [R. 90], Mr. Konigsberg replied that "the treatment in Cleland's novel is obviously more healthy". The contemporary novels "deal with various kinds of love in modern 20th day society, and it is generally treated ruthlessly. That is, the relationship between the sexes is seen as another manifestation of modern decadence, insterility, or perversion. Cleland's point simply is this, that, with love, the relationship between men and women can be a wholesome, healthy, experience itself." [R. 91].

The trial court asked, "What about the three other girls whose history is given in the book besides Fanny? Remember about three other associates of hers in whatever you might call her calling?" [R. 91]. The witness answered, "Well, actually, they are dealt with similarly in a complex manner. If I recall, the three of them end up well. . . ." [R. 91]. Fanny is "quite willing to expose" the various aspects of the three girls' professional life which are "perverse or in bad taste or without love" but "when the actual relationship with men is one composed partly of love, then she is willing not to condemn it but to appreciate it, and the same standard is held with these women." [R. 92]. In answer to the trial court's question, "Would you say these three other girls told

about their experiences with a sense of pride?" or "Sense of exultation?" he replied, "No, I wouldn't use those particular words. I think they are too strong for that. . . ." [R. 92].

Mr. Konigsberg stated that in the modern novel and in art forms we "have an emphasis today upon violation of physical being, upon grotesqueness, upon various kinds of physical injury and harm. This is very prevalent in the modern novel as well as in other art forms. What Cleland is saying is just the opposite, that the human body is something that is wholesome, that is healthy, that is normal, and that is beautiful, and when people come together in love, then in the experience itself is something that is wholesome. . . ." [R. 92-93].

In answer to the trial court's question, "What about the whipping incident" and "The homosexual incident" and "The lesbianism?" the witness replied, "These acts of sexual perversion are there to be juxtaposed to the acts which are partaken in sexual health. Otherwise the point couldn't be made." [R. 93]. In answer to the trial court's question, "Would you describe the description given by the author of these acts as pornographic?" the witness answered, "Could you tell me what you mean by pornographic" and "I don't know what you mean. I know what I would mean by pornographic" [R. 93].

On cross-examination by the Attorney General, Mr. Konigsberg stated that he was presently writing "a scholarly book on the novel". In answer to the question, "Do they deal with sex in the same way that Fanny Hill deals with sex?" he replied, "I can answer that with a qualification. The qualification is no two books can handle sex the same, but they do have a similar

emphasis upon sexual matters, yes." Asked if he could write his scholarly work without the benefit of Fanny Hill, he answered, "Yes, I could, although it would be —." [R. 94].

The attorney for the intervenor rested his case.

In his findings the trial judge reversed his ruling as to Exhibits 1 to 4 and considered them in his deliberation [R. 104]. On September 3, 1964, the trial judge entered extensive findings of fact, rulings of law, and an order for a final decree that the book entitled "John Cleland's Memoirs of a Woman of Pleasure" commonly known as "Fanny Hill" is not entitled to the protection of the First Amendment of the United States Constitution, and finding the said book obscene under the provisions of General Laws, Chapter 272, Section 28 C, E and F, as amended by Statutes 1945, Chapter 278 [R 100-117].

The trial court said, at R-116 "Careful review of all the expert testimony has been made, but, the best evidence of all, is the book itself and it plainly has no value because of ideas, news or artistic, literary or scientific attributes. *Attorney General v. Tropic of Cancer,* 345 Mass. 11, at 16. Nor does it have any other merit. 'This court will not adopt a rule of law which states obscenity is suppressible but well written obscenity is not.' Mr. Justice Scilippi in *People v. Fritch,* 13 N.Y. 2d 119. No 'weighing' of any of its alleged social importance against its prurient interest appeal is needed. 'Hard-core' pornography has no literary merit or social value. *Attorney General v. Tropic of Cancer,* 345 Mass. 11, 15, fn 5. It is concluded that this book is 'utterly without redeeming social importance' in the fields

of art, literature, science, news or ideas of any social importance and that it is obscene, indecent and impure.'" The final decree was entered on December 17, 1964.

The Supreme Judicial Court of Massachusetts affirmed the decision in Attorney General v. A Book Named "John Cleland's Memoirs of a Woman of Pleasure", 206 N.E. 2d 403 (April 22, 1965). This opinion appears at R-120-129.

Summary of Argument.

I.

The public policy of the United States Supreme Court has always championed the obscenity laws. Yet with all of this case law support, the communities are being inundated by a horde of obscenity which the law is not reaching.

The prosecutors are claiming that they have no remedy and that the Supreme Court stands too eager to reverse their successes, when they occur. *Amicus* do not picture this to be the true situation.

This Court recognizes that the debasement of sex has been with mankind down through the centuries and that the obscenity laws are necessary for a strong community life. The *Roth-Alberts* decision is testimony of the fact that criminal penalties are authorized procedures to regulate this type of conduct.

Most of the recent cases before this Court since 1957 have involved "previous restraint" controls, such as movie licensing cases, search warrant procedures, the right of the postmaster to refuse mail on the grounds it is obscene, etc. Whereas an earlier Court in *Near v. Minnesota* had indicated "previous restraint" could clearly be employed against obscene materials, this mod-

ern Court has restricted that interpretation considerably by procedural rules. In doing so, a number of obscenity judgments were reversed on procedural grounds, making it appear that this Court was releasing the matter as not being obscene. Such decisions have misled and discouraged prosecutors.

In several cases the justices have been unable to agree on an "Opinion of the Court." The theories of the case set forth by the individual justices do not lead to an orderly understanding of the law.

On the other hand, this Court has denied review in at least 21 criminal cases which have come before it since 1957. These cases were without opinion and have not been publicized. They are not generally known to the individual prosecutors, who lose heart when they see all losses and no victories.

Then too, some prosecutors do not recognize the distinction between criminal prosecutions and previous restraint cases. The prosecutors need a direct signal from the Court.

II.

The presence of "Fanny Hill" in this Court places the spotlight on the real substantive matters at issue—the concern of government and courts of justice over the corrosive effects which weigh against the people's sense of sexual morality, and the sovereign right of a state government to control conduct relating thereto. Proper consideration must be given to the historic *reasons* for the obscenity laws. It is wrong to concentrate one's attention solely on the rule under which the law is administered.

Two centuries ago the Common Law Courts of England were faced with a historic situation, similar to that

in the present day United States. The community was surrounded with an excessive kind of libertine life, with excessive sexual freedom. To combat these excesses in the field of literature those Courts in 1727 created the Common Law Crime of Obscene Libel. Twenty two years later, the book which is in this Court was first published, and upon publication was caught in the snares of the obscenity laws. It has, since that time, enjoyed over 214 years of suppression.

Appellant cannot assume the disguise of an old line publishing company, having made a very deliberate and substantial move into the production of erotic literature. Other publishers, with lesser reputations, are also producing "Fanny Hill". Most of the other publishers deal exclusively in sex materials. All are interested in capitalizing commercially on its erotic qualities. All operations will be equally affected.

The function of the obscenity laws is to preserve the peace of government by preserving the morality of the people. If vice is tolerated, it affects our standards of morality adversely. The great majority of people believe that the morals of "bad" people do threaten the security of the "good" people and that a minority should not be permitted to flaunt their immoralities where they will shock others. Parents have a right to shape the moral notions of their children and the general public have a right not to be subjected to violent psychological assault.

We contend that strong obscenity law enforcement can assist in reversing the current trend toward anti-social sexual misconduct.

The constitutional test expressed in the *Roth-Alberts* case in 1957 has not been changed. Subject matter whose

dominant appeal is to prurient interest can be proscribed. The interest is either "prurient" or it is "normal." The line between candor and shame is a narrow one. To allow sufficient leeway so as not to inhibit legitimate expression, the proscribed material must be sufficiently over the line. A jury trial in a criminal forum provides this safeguard, as does the requirement that the material must go "substantially beyond customary limits of candor."

Slight social importance does not exculpate where the predominant appeal is to prurient interest. The result is otherwise if the degree of pruriency is submerged and the social interest is the predominant theme.

Subsequent events have indicated that the result in *Grove Press Inc. v. Gerstein* should be abandoned. Neither courts, law enforcement or publishers understand the distinction between "obscenity" and "well-written obscenity." If courts can require decency in expression from attorneys who present ideas in the courtroom, the communities should be able to require the same degree of decency from artists in the market place.

"Fanny Hill" is obscene under all standards. It is essentially an appeal to the "voyeur" perversion.

It has been the universal judgment of history that "Fanny Hill" should be restrained.

ARGUMENT.

I.

AN INTEGRATED REVIEW OF THE OBSCENITY CASE LAW.

A. Public Policy.

The public policy of this Court has always championed the obscenity laws. See *Rosen v. U. S.*, 161 U.S. 606 (1896),[1] decided by the U.S. Supreme Court at the turn of the century. This favored policy is not difficult of understanding. Central to our heritage is the expectation that our Courts should strive to preserve our heritage and should not give scandal[2] by tolerating anything which tends to debase public morals.

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[1]Rosen attempted to escape a jury conviction on an obscenity charge on a technicality. He sought his freedom on appeal, arguing that, because the People had not described the obscenity in their complaint (referred to by the court as "the record"), he had not been properly informed of the nature of the crime. United States Supreme Court Justice John Marshall Harlan, grandfather of the present United States Supreme Court Justice John Marshall Harlan, rejected this plea out of hand and, in invoking the unanimous rule of the courts at that time, drew from the language of an earlier Massachusetts Supreme Court decision at page 608:

> "It can never be required that an obscene book and picture should be displayed upon the records of the court. . . . This would be to require that the People itself should give permanency and notoriety to indecency in order to punish it."

His Massachusetts reference was the first recorded case in the United States against a book, *Commonwealth v. Holmes*, (1821). The book in the Massachusetts case was "Fanny Hill," a century and a half later to find its way before this Court in *A Book Names "John Cleland's Memoirs of A Woman of Pleasure" v. Attorney General of Massachusetts*, October Term, No. 368.

[2]Webster's Collegiate Dictionary, Fifth Edition, defines "scandal" as "The distressing effect on others of unseemly or unrighteous conduct; especially, an occasion of another's lapse in faith or morals as to give scandal to one's children . . . 3. That which offends established moral conceptions or disgraces all who are associated or involved." Tolerance of indecency, for any reason, even for purposes of administration, had the undesirable effect of giving notoriety and acceptance to the material and dignifying its appearance.

Less than 35 years ago this Court underscored this same "favored position" of the obscenity laws when, in *Near v. Minnesota,* 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 (1931)[3] the members of that Court made it clear that immunity from previous restraint did not extend to obscene publications.

Eleven years later, not one member of the 1942 Court entertained any doubt that the existence of obscenity was contrary to the people's abiding interest in good public morals. Neither the prevention of publication (previous restraint) nor criminal punishment for dissemination raised any constitutional problems in their view. In *Chaplinsky v. New Hamphsire,* 315 U.S. 568, 86 L. Ed. 1031, 62 S. Ct. 766 (1942) that Court said at page 571:

> ". . . There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene. . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . ."

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[3]"The objection has . . . been made that the principle as to immunity from previous restraint is stated too broadly, if every such restraint is deemed to be prohibited. That is undoubtedly true; the protection even as to previous restraint is not absolutely unlimited. *But the limitation has been recognized only in exceptional cases.* 'When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.' Schenck v. United States, 249 U.S. 47, 52. No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. *On similar grounds, the primary requirements of decency may be enforced against obscene publications.*" (Our emphasis.)

Ten years later, the majority of the members of the 1952 Court in *Beauharnais v. Illinois,* 343 U.S. 250, 72 S. Ct. 725, 96 L. Ed 919 (1952) agreed with the *Chaplinsky Court,* adding:

> "Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances (clear and present danger) . . ."

When, five years later, in *Roth v. U.S.* and *Alberts v. California,* 354 U.S. 476, 77 S. Ct. 1314, 1 L. Ed 2d 1498 (June 24, 1957), this present Court was faced with a broadside attack on the statutes guarding public decency, seven members of this modern court stood firm and enunciated a solid distaste for obscenity. *Rosen v. U.S. (supra), Near v. Minnesota (supra), Chaplinsky v. New Hampshire* (*supra*), and *Beauharnais v. Illinois (supra)* were all confirmed. The language of *Rosen* was cited with approval. Everyone was charged with notice of what must be deemed obscene. The *Roth-Alberts* majority opinion placed emphasis on the language of *Chaplinsky* noted above. Obscene utterances were of such slight social value as a step to truth that any benefit to be derived from them was clearly outweighed by the social interest in order and morality. The above language of the *Beauharnais* Court was cited with approval. No one could contend that obscene speech could be punished only upon a showing of a clear and present danger.

Under such a regime, it did appear as though the communities had the proper defense mechanisms and the modern assault on public morality could easily be turned back.

Yet with all this unaninity, elegance of language, and profuseness of citation to buttress the foundations of our anti-obscenity fortresses, the stockades are presently in danger of collapsing for lack of riflemen, abetted by confusion. The communities of this nation, eight years later, find themselves with a horde of filth, printed, visual, vocal and otherwise, of unprecedented force, threatening to erode the very foundations of the basic morality upon which our nation and our Constitution were founded.[4] In the face of this peril the public prose-

[4]"A tide of printed filth is advancing across the land in a way which should give every wholesome-thinking person cause to wonder whether it may not erode the very foundations of the basic morality upon which our nation and our Constitution were founded.

In bookstores, railroad stations, air terminals, drug stores, everywhere that print is displayed and pictures revealed, there stand pyramids of smut, pornography and obscenity contaminating the very air in which they rest. Language which would be too raw and grating for the dives of opium-smoking debauchees degrades and defaces the paper which carries it.

Magazines with pictures and sketches that would disgrace oriental harems are sold to children as if they were as innocuous as bags of popcorn. Exotic rites that would bring the blush of shame to the faces of the most primitive tribes are described with nonchalance in high-priced books, medium-priced books, and low-priced books. Themes which should be the subject only for clinical studies in the hospitals for the criminal insane are turned into scarifying stories which are bound to bring harm to the youths into whose hands they fall.

Acts of degeneracy and unnatural conduct are being portrayed in contemporary literature as if they were normal and accepted practice in civilized life. Adultery and every other type of illegal and sinful conduct is being depicted glamorously, as if calling for emulation.

The healthful, romantic, and poetic relationship between man and woman is being treated in the basest and most animalistic terms.

Under the false guise of instruction and knowledge, so-called manuals on marriage are being turned out in myriads of copies for the sole purpose of appealing to prurient and lascivious minds. The sick outpourings of degenerate brains are being bound in hardback books and paperback books and sometimes in elegant and expensive leather. Titles and cover pictures which in themselves

cutor bleats that he has no remedy and that it is useless to prosecute, since the Supreme Court will reverse the jury's findings.

CDL is at complete odds with such ideology. Unlike our knowledge of outer space, which is increasing in geometric proportions through discoveries in space explorations, our knowledge of sex is profound, for sex has been with us since the beginning of mankind. As to the sexual relation, it can be said, with some degree of truth, that there is "nothing new under the sun." Similarly, the assault which has as its objective the debasement of sex has been with mankind down through the centuries. That which motivates the pornographer, in 1965, motivated John Cleland two centuries earlier. Recognition of the universal need for strong community

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are suggestive, pornographic, indecent and obscene shout their vulgarity to passersby.

It used to be that pornographic literature, to the extent that it existed, was sold clandestinely. The secrecy and the furtiveness with which it was sold and circulated was an indication that the public looked upon it as something improper and not in consonance with the morals of the community. But now the most salacious books, the most degrading publications are sold in book stores, drug stores, five and ten cent stores, and at the newsstands. It is difficult to think of a place where print appears that one's eyes and spirit will not be assailed by pornography of the vilest character.

In short, a wide river of filth is sweeping across the nation, befouling its shores and spreading over the land its nauseating stench. But, what is most disturbing of all, is that persons, whose noses should be particularly sensitive to this olfactory assault, do not smell it at all. I refer to district attorneys and prosecuting officers throughout the nation. Of course, there are a large number of district attorneys in the country who are doing their duty and doing it well, but a larger number of prosecuting officials are shrugging unconcerned shoulders at this violent assault on law, morality and decency."

. . . From an address given by Associate Justice Michael A. Musmanno of the Pennsylvania Supreme Court at the Waldorf-Astoria New York City on October 23, 1965.

controls in this modern era has amply been witnessed by this Court in *Roth-Alberts* when it said at page 484:

> "But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 states, and in the 20 obscenity laws enacted by the Congress from 1942 to 1956. . . ."

Nevertheless, there is, in our opinion, a crisis facing this nation which requires the members of this Court to bear witness through concrete action and to drive home, once and for all, the basic fact, which is escaping so many at the present time, that this Court really has not, in its decisions since *Roth-Alberts* underwritten the sale of "perversion for profit."

If we understand correctly what has occurred in the ensuing years since *Roth-Alberts,* this Court has not altered the basic position taken by it in those cases; namely that criminal cases which applied the proper standard for judging obscenity, did not offend constitutional privileges. This Court held at page 492:

> "In summary then, we hold *that these statutes, applied according to the proper standards for judging obscenity, do not offend constitutional safeguards against convictions* based upon protected material, or fail to give men in acting adequate notice of what is prohibited. . . ." (Our emphasis).

B. The Problem of Previous Restraint Cases.

Unfortunately, a line of cases followed which enjoyed in common the element of previous restraint,[5] a factor not present in the *Roth* and *Alberts* cases, which authorized criminal penalties as the just consequences of the defendants' temerous conduct. This Court did not react as favorably to this new issue as the earlier Courts in *Near v. Minnesota (supra)* which had *excluded previous restraint controls* in the case of *obscene publications from the operation of the Blackstone rule,* which held that:

"The liberty of the press is indeed essential to the

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[5]Previous (prior) restraint was a major issue in each of the following: *Times Film Corporation v. City of Chicago,* 355 U.S. 35, 78 S. Ct. 115, 2 L. Ed. 2d 72 (1957) (Movie license—no opinion), reversing 244 F. 2d 432 (7th Cir. 1957) and 139 F. Supp. 837 (1956); *Mounce v. U. S.,* 355 U.S. 180, 2 L. Ed. 2d 187 (1957) (customs case—no opinion), reversing 247 F. 2d 148 (9th Cir. 1957) and 134 F. Supp. 490 (1955); *One Inc. v. Olesen,* 355 U.S. 371, 78 S. Ct. 364, 2 L. Ed. 2d 352 (1958) (right to deposit mail—no opinion) reversing 241 F. 2d 772 (9th Cir. 1957); *Sunshine Book Co. v. Summerfield,* 355 U.S. 372, 78 S. Ct. 365, 2 L. Ed. 2d 352 (1958) (right to deposit mail—no opinion) reversing 249 F. 2d 114 (D.C. Circuit 1957) and 128 F. Supp. 564 (1955); *Times Film Corp. v. City of Chicago,* 365 U.S. 43, 81 S. Ct. 391, 5 L. Ed. 2d 403 (Jan. 23, 1961) (movie license) reversing 272 F. 2d 90 (7th Cir. 1959) and 180 F. Supp. 843 (1959); *Marcus v. Kansas City Search Warrants,* 367 U.S. 717, 81 S. Ct. 1708, 6 L. Ed. 2d 1127 (June 19, 1961) (Seizure), reversing 344 S.W. 2d 119 (1960); *Manual Enterprises Inc. v. Day,* 370 U.S. 478, 82 S. Ct. 1432, 8 L. Ed. 2d 639 (June 25, 1962) (right to deposit mail), reversing 289 F. 2d 455 (D.C. Circuit 1961) *Bantam Books Inc. v. Sullivan,* 372 U.S. 58, 83 S. Ct. 631, 9 L. Ed. 2d 584 (Feb. 18, 1963) (Warnings) reversing 176 A. 2d 393; *A Quantity of Books v. Kansas,* 378 U.S. 205, 84 S. Ct. 1723, 12 L. Ed. 2d 809 (June 22, 1964) (Seizure), reversing 191 Kan. 13, 379 P. 2d 254 (1963); *Freeman v. Maryland,* 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (Mar. 1, 1965) (Movie license), reversing 233 Md. 458, 197 A. 2d 232 (1964); *Trans-Lux Distributing Corp. v. Board of Regents of the University of New York,* 380 U.S. 259, 85 S. Ct. 952, 13 L. Ed. 2d 959 (1965) (movie license—no opinion). Reversing 14 N.Y. 2d 88, 248 N.Y.S. 2d 857 (1964).

nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity" 4 Bl. Com. 151, 152.

The cloud of confusion which was to appear was forecase in *Kingsley Book Inc. v. Brown,* 354 U.S. 436, 77 S. Ct. 1325, 1 L. Ed. 2d 1469 (June 24, 1957), decided on the same day with *Roth-Alberts.* In that case, this Court split five-to-four in approving the New York injunctive action, which authorized limited previous restraint. It was here that Justice Brennan and Warren parted company with the majority in the *Roth* and the earlier Courts.

The confusion and disruption commenced one year later with the *per curiam* reversals without opinion in the *Times Film Corporation, One Inc.,* and *Sunshine Book Co.* cases[6] (cited in footnote 5). Later written

[6]For example, the claim is widespread that Sunshine Book Company stands for the proposition that nudist magazines are not obscene, no matter what may be the publisher's or disseminator's intent, the format, method of distribution, policy of the state etc. See here the recent result in *Connecticut v. Martin et al.* (June 17, 1965), where the Appellate Division of the Circuit Court reversed (2-1) an extremely well reasoned trial court opinion, solely upon the basis of the *Sunshine Book Co.* case. We believe such claim to be utterly groundless. See *Outdoor American Corporation v. City of Philadelphia,* 333 F. 2d 1963 (June 30, 1964) certiorari denied 85 S. Ct. 192, 13 L. Ed. 2d 176 (Nov. 9, 1964); *Luros v. Hanson,* petition for certiorari filed Sept. 27, 1965, Oct. Term, 1965 No. 620; *Hadley v. Arkansas,* 205 Ark. 1027, 172 S.W. 2d 237 (1943); *King v. Commonwealth,* 233 S.W. 2d 522 (Oct. 20, 1950); *Missouri v. Becker,* 364 Mo. 1079, 272 S.W. 2d 283 (1954), cited with approval in

opinions in *Marcus, Manual Enterprises, Inc.* and *A Quantity of Books* gave specific recognition to the fact that the obscenity issue was not reached in this Court's reversals of those lower Court judgments on previous restraint grounds. What factor the previous restraint element played in the 1958 decisions will never be known.[7] Subsequent opinions have revealed a common disagreement between the justices on what constitutes the vital phase of the case. See the No Clear Majority Decisions, *infra*. Then too, the Court's membership has changed.[8]

As breeding grounds, the 1958 *per curiam reversals* acted with catalytic action to spawn the "hard core pornography" rule in one of the major centers of pornopraphic production in the United States. *New York v. Richmond County News Co.*, 175 N.E. 2d 681 (May 25,

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Roth-Alberts at footnote 26; *Sunshine Publishing Co. v. George N. Parris* (unreported, Circuit Court, Macomb County April 29, 1963); *Nebraska v. Jungclaus*, 176 Neb. 641, 126 N.W. 2d 858 (Mar. 13, 1964); *Dale Book Co. v. Leary*, 233 F. Supp. 754 (Aug. 12, 1964); *City of Phoenix v. Fine* (unreported, Superior Court Maricopa County, Arizona, Jan. 22, 1965); *Missouri v. Vollmar*, 389 S.W. 2d 20 (Mar. 8, 1965); *Virginia v. Dave Rosenbloom* (unreported, Suffolk County, Richmond, Virginia, June 10, 1965); *Arizona v. Arizona Magazine Distributors Inc.* (unreported, West Phoenix Justice Court, Maricopa County, Aug. 26, 1965); *Arizona v. Al Sacks* (unreported, West Phoenix Justice Court, Maricopa County, Sept. 1, 1965).

[7]The *per curiam* decisions are criticized in "Obscenity, Pornography and Censorship by Thomas R. Mulroy of the Illinois Bar in 49 American Bar Association Journal (Sept. 1963) at 869. The author cites Justice Jackson's remarks on the empirical reversal of a case without opinion in *Brownell v. Singer*, 347 U.S. 403 (1954):

> "The Court's one-word decision reverses concurring judgments of three highly respected courts . . . (by citing) a single case. . . . I think this Court owed those Courts and the legal profession something more than reference to an inapplicable decision."

[8]Justices Frankfurter, Whittaker and Burton have been replaced by Justices Fortas, White and Stewart.

1961.)[9] Abetted by a misconstruction of the no clear majority opinion decision in the *Manual Enterprises Inc.* case and a misapplication of the special view entertained by Justice Harlan in federal cases, the "hard core pornography" rule spread to the other major centers of pornographic production. *Zeitlin v. Arnebergh,* 59 Cal. 2d 901, 31 Cal. Rptr. 800 (July 2, 1963).[10]

C. The No Clear Majority Decisions.

The common disagreement between the justices has given birth to a number of "no clear majority" decisions which confound and confuse.[11] *Manual Enter-*

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[9]There is reason to believe that had Justice Desmond recognized the significance of the previous restraint issue in the 1958 cases, his deciding vote would have been cast differently and the minority in that case would have prevailed. See Justice Desmond's concurring opinion in the *Richmond County News Co.* case, his concurring opinion in *People v. Fritch,* 13 N.Y. 2d 119 (June 10, 1963), and his dissenting opinions in *Larkin v. G. I. Distributors Inc.,* 14 N.Y. 2d 869 (June 10, 1964); *Larkin v. G. P. Putnam's Sons,* 14 N.Y. 2d 399 (July 10, 1964); *People v. The Bookcase Inc. et al.,* 14 N.Y. 2d 409 (July 10, 1964).

[10]That the California Supreme Court misinterpreted the Harlan view seems apparent from Justice Harlan's vote to deny certiorari in *Grove Press Inc. v. Gerstein,* 378 U.S. 577 (June 22, 1964), a state case. The language of the *Zeitlin* case suggests however, that the author would have come by the same result no matter how he chose to interpret Justice Harlan's opinion in the *Manual Enterprises case.*

[11]One of the basic postulates of the American case law system is that the decision of a majority determines the result, and an "opinion of the court" is written expressing the reasoning agreed upon by the majority. When a majority agree on the result, the decision is final as between the litigants. When a majority agree in the reasoning for the result, the opinion which expresses this reasoning is called the "opinion of the court." If a majority agree on the result, but do not agree in the reasoning for the result, there is no "opinion of the court," even though the controversy is ended as between the parties to the lawsuit.

The decision plus the reasoning found in the "opinion of the court" determine the precedent value of any particular case. In many obscenity cases, however, there has been no "opinion of

prises Inc. v. Day, 370 U.S. 478, 82 S. Ct. 1432, 8 L. Ed. 2d 639 (1962); *Jacobellis v. Ohio,* 378 U.S. 184, 84 S. Ct. 1676, 12 L. Ed. 2d 793 (1964); *A Quantity of Books v. Kansas,* 378 U.S. 205, 84 S. Ct. 1723, 12 L. Ed. 2d 809 (1964); *Grove Press Inc. v. Gerstein,* 378 U.S. 577, 84 S. Ct. 1909, 12 L. Ed. 2d 1035 (1964); *Tralins v. Gerstein,* 378 U.S. 576, 84 S. Ct. 1903, 12 L. Ed. 2d 1033 (1964). The order in appearance of an opinion, rather than solid precedent, often controls the destiny of the people's defenses against the assaults on public morality.[12]

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the court," as where the majority have agreed *only* upon the *result,* (*i.e.,* judgment reversed) but have not been able to agree upon the supporting reasoning.

Text books on judicial precedent indicate that theoretically the "no-clear-majority" decision stands only for its general result. See Wambaugh, *The Study of Cases* (Second Edition, 1894), at page 50:

> "Even when all the judges concur in the result, the value of the case as an authority may be diminished and almost wholly destroyed by the fact that the reasons given by the several judges differ materially. . . . 'There must be a concurrence of a majority of the judges upon the principles, rules of law, announced in the case, before they can be considered settled by a decision. If the court is equally divided or less than a majority concur in a rule, no one will claim that it has the force of the authority of the court.' "

See also Black, *Handbook of Judicial Precedent* (1912), pages 135-136:

> "If all or a majority of the judges concur in the result . . . but differ as to the reasons which lead them to this conclusion, the case is not an authority except upon the general result."

[12]The confusion of the State courts as to what is taking place in the United States Supreme Court is spotlighted in *Arizona v. Locks,* 97 Ariz. 148, 397 P. 2d 949 (Dec. 30, 1964). That court said, in error, at page 951:

> "This was followed by *Manual Enterprises Inc. v. Day,* 370 U.S. 478 . . . *holding* the publication of photographs of nude male figures designed to appeal to homosexuals not to be so obscene as to lose the protection of the First Amendment. (Our emphasis)."

The Arizona Supreme Court's reversal of a jury decision on girlie magazine subject matter was based largely on a compari-

D. A Major National Problem.

In the absence of knowledgeable defending riflemen, compounded by the confusion, those well-buttressed fortresses are being subjected to a withering attack. On October 21, 1965, the Los Angeles County Grand Jury returned a two count indictment against 14 defendants in *California v. Milton Luros, et al.,* Superior Court case No. 295,183, for conspiracy to manufacture and distribute girlie magazines, nudist magazines and nine lesbian-type paperback books (including Fanny Hill). On February 15, 1965, the count covering the girlie and nudist magazines was dismissed without trial in a pre-trial motion to dismiss the indictment. Superior Court Judge Walter R. Evans, in dismissing, had this to say:

> "In view of the time I have had to study it, I have found it extremely interesting, but absolutely amazing. I was concerned as to the extent to which the United States Supreme Court—I am very frank to say, and I think I am entitled to say it, that I disagree wholeheartedly with the United States Supreme Court cases. I think the so-called founding fathers who promulgated our Constitution probably would turn over in their graves if they saw the extent to which the United States Supreme Court has stretched the protection to this type of material which to me, has no value to anybody. However, that is my personal position. I want to get that off my chest. I think there is nothing but filth from beginning to end in this material. However,

son with this erroneous reference and belief that Justice Harlan's opinion was the opinion of the Court. The Arizona Court had indicated a different view on the subject matter when the case was before it previously in 372 P. 2d 724 (June 20, 1962) and 382 P. 2d 241 (May 25, 1963).

that is my personal opinion, and I think that counsel pointed out that I still have an obligation to follow what I think are the rules laid down by the United States Supreme Court. I was interested in reading one of the learned justices who said that maybe some day the balance will start swinging back where honesty and decency would start entering into a consideration of this thing. I hope it will."

He thought eight of the lesbian-type paperbacks (but strangely, not Fanny Hill) a jury issue, and Count 2 was set for trial. The people's action was short lived however. Although both the District Court of Appeal and the California Supreme Court thereafter refused the defendants a writ of prohibition on the count involving the lesbian-type paperback books, Trial Judge Joseph Sprankle dismissed the case, without trial on June 14, 1965. The books' titles, Lesbian Sin Song, Two Women in Love, Counterfeit Lesbian, Lesbian Captive, Lesbians in White, The Girls at Wendy's, The Three Way Apartment and Honey Lips, sung out the perversion they peddled.

In another action by the people—this time against a notorious national disseminator located in New York—a criminal obscenity indictment was short-circuited by trial judge J. Irwin Shapiro, when he dismissed *New York v. Ray Kirk, Birch, All State News Co. Inc., et al.*, 40 Misc. 2d 626, 243 N.Y.S. 2d 525 (Sept. 6, 1963) without trial. In so holding, Judge Shapiro refused to follow controlling precedent in his state, for one of the books supporting the indictment had already been held obscene by New York's highest court in *New York v. Harry Fried*, 18 A. 2d 996, 238 N.Y.S. 2d 742 (Mar. 26, 1963). Appeal dismissed for want of jurisdiction.

Treating the paper whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied (Justice Black, Douglas and Stewart are of the opinion probable jurisdiction should be voted and judgment reversed 378 U.S. 578, 84 S. Ct. 1904, 12 L. Ed. 2d 1033 (June 22, 1964).[13]

E. A Problem of Communication.

The confused results reached in the lower courts noted above does not seem warranted to CDL, when one considers the overwhelming weight of case law in the opposite direction. The key to an awakening of law enforcement seems bound up in the remarks of Chief Justice Warren in *Jacobellis v. Ohio (supra)* at page 1684:

> ". . . This Court hears cases such as the instant one not merely to rule upon the alleged obscenity

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[13]Federal courts are equally confused. See *United States v. Klaw and Jack Kramer,* 350 F. 2d 155 (2nd Circuit July 15, 1965) and *Haldeman v. U.S.,* 340 F. 2d 59, 62 at fn. 6 (10th Cir. Jan. 13, 1965):

> "Mr. Justice Stewart, concurring in Jacobellis, declined to define the term 'hard-core pornography,' but stated: 'I know it when I see it . . .' The writer of this opinion has also felt that he would 'know it when he saw it' but a reading of some of the published material held to be constitutionally protected tends to raise doubts regarding one's perceptive abilities in such matters . . ."

When District Judge George Templar found himself reversed as the trial judge in the *Haldeman* case, he turned around and dismissed two major federal grand jury indictments against nationally notorious smut peddlers: Louis Linetsky aka John Amslow & Co. in *United States v. Linetsky,* No. T-CR 582 (D.C. Kansas) (June 24, 1965) and an equally notorious smut merchant in *United States v. Wasserman* (D.C. Kansas) No. T-CR-581 (June 29, 1965). The former involved girlie magazines and illustrations of females in the nude and the latter involved motion picture films. Compare these results with *Roth-Alberts (supra); Frank L. Collier v. U.S. (infra); Herman L. Womack v. U.S. (infra); Chobot v. Wisc. (infra); Roy A. Oakley v. U.S. (infra) Monfred v. Maryland (infra); Heinecke v. U.S. (infra); Goldstein v. Virginia (infra); Wenzler and Imlay v. Calif. (infra).*

of a specific film or book but to establish principles for the guidance of lower courts and legislatures. *Yet most of our decisions since Roth have been given without opinion and have thus failed to furnish such guidance. . . .*" (our emphasis).

With the exception of the four *per curiam* decisions in 1958, the only obscenity decisions since Roth-Alberts which have been without opinion, were those in which this Court has dismissed an appeal or denied certiorari. This Court should call attention to these decisions denying certiorari and dismissing appeals. In so far as we have been able to ascertain they are 21 in number:

John G. Matthews v. Florida, writ of certiorari denied 356 U.S. 918, 78 S. Ct. 702, 2 L. Ed. 2d 714 (March 31, 1958), notwithstanding the similarity of the statute to the Michigan Statute in *Butler v. Mich.,* 352 U.S. 80;

Wyman Hulan Parr v. U.S. (film), 255 F. 2d 86, writ of certiorari denied 358 U.S. 824, 79 S. Ct. 40, 3 L. Ed. 2d 64 (Oct. 13, 1958);

Max Padell v. U.S. (paperback books), 262 F. 2d 357, writ of certiorari denied 359 U.S. 942 79 S. Ct. 723, 3 L. Ed. 2d 676 (March 23, 1959);

Robert H. Cain v. U.S., 274 F. 2d 598, writ of certiorari denied 362 U.S. 952, 80 S. Ct. 864, 4 L. Ed. 2d 869 (April 18, 1960);

Samuel R. Hochman v. U.S. (paperback books: "The Sex Factory" and "Virgins Come High") 277 F. 2d 631, writ of certiorari denied (Justices Black and Douglas voted to grant certiorari) 364 U.S. 837, 81 S. Ct. 70, 5 L.

Ed. 2d 61 (Oct. 10, 1960) rehearing denied, 364 U.S. 906, 81 S. Ct. 231, 5 L. Ed. 2d 199 (Nov. 21, 1960);

Frank L. Collier v. U.S. (photographs of nude young men) 283 F. 2d 780, writ of certiorari denied 365 U.S. 833, 81 S. Ct. 746, 5 L. Ed. 2d 744 (March 6, 1961);

Herman Womack v. U.S. (photographs of nude young men) 294 F. 2d 204, writ of certiorari denied 365 U.S. 859, 81 S. Ct. 826, 5 L. Ed. 2d 822 (March 27, 1961);

Astore v. U.S. (film) 288 F. 2d 26, writ of certiorari denied, 366 U.S. 925, 81 S. Ct. 1352, 6 L. Ed. 2d 384 (May 15, 1961);

Joseph Chobot v. Wisconsin (girlie magazines: "Spice" "Adam" "Spree" and "Blondes, Brunettes, and Redheads") 12 Wis. 2d 110, 106 N.W. 2d 286, appeal dismissed for lack of a federal question (Justices Black, Douglas and Harlan voted for probable jurisdiction), 368 U.S. 15, 82 S. Ct. 136, 7 L. Ed. 2d 85 (Oct. 23, 1961) rehearing denied 368 U.S. 936, 82 S. Ct. 358, 7 L. Ed. 2d 198 (Dec. 4, 1961);

Roy A. Oakley v. U. S. (unretouched photographs of naked young women) 290 F. 2d 517, writ of certiorari denied 368 U.S. 888, 82 S. Ct. 139, 7 L. Ed. 2d 87 (Oct. 23, 1961) rehearing denied, 368 U.S. 936, 82 S. Ct. 358, 7 L. Ed. 2d 198 (Dec. 4, 1961);

Harry Monfred et al. v. Maryland (girlie magazines: "Candid" "Consort" "Sextet" "Cloud 9" "Torrid"), 226 Md. 312, 173 A. 2d 173, writ

of certiorari denied 368 U.S. 953, 82 S. Ct. 395, 7 L. Ed. 2d 386 (Jan. 8, 1962);

Alfred J. Heinecke v. U.S. (Photographs of nude young men—similar to *U.S. v. Womack*) 294 F. 2d 727, writ of certiorari denied (Justices Black and Douglas voted to grant certiorari), 368 U.S. 901, 82 S. Ct. 173, 7 L. Ed. 2d 96 (Nov. 6, 1961);

Harold S. Kahm v. U.S. (for description of subject matter, see 300 F. 2d 78 at 82), 300 F. 2d 78, writ of certiorari denied 369 U.S. 859, 82 S. Ct. 949, 8 L. Ed. 2d 18 (April 23, 1962);

Louis Finkelstein et al. v. New York (paperback books: "Garden of Evil" and "Queen Bee"), 229 N.Y.S. 2d 367, 183 N.E. 2d 661 writ of certiorari denied (Justice Douglas voted to grant certiorari), 371 U.S. 863, 83 S. Ct. 116, 9 L. Ed. 2d 100 (Oct. 15, 1962);

Harold Zucker v. New York (3 sado-masochistic books similar to 50 books involved in *New York v. Mishkin,* also before this court), writ of certiorari denied (Justice Douglas voted to grant certiorari) 371 U.S. 863, 83 S. Ct. 116, 9 L. Ed. 2d 100 (Oct. 15, 1962);

Arthur Goldstein v. Virginia (girlie magazines) writ of certiorari denied 372 U.S. 910, 83 S. Ct. 726, 9 L. Ed. 2d 720 (Feb. 18, 1963);

Edward Mishkin v. U.S. (books not named), 317 F. 2d 634, writ of certiorari denied 375 U.S. 827, 84 S. Ct. 71, 11 L. Ed. 2d 60 (Oct. 14, 1963);

John Darnell, III, v. U.S. (obscene letter), 316 F. 2d 813, writ of certiorari denied (Justice Douglas voted to grant certiorari), 375 U.S. 916, 84 S. Ct. 205, 11 L. Ed. 2d 155 (Nov. 12, 1963), rehearing denied, 375 U.S. 982, 84 S. Ct. 493, 11 L. Ed. 2d 429 (Jan. 6, 1964);

Nirvana Ward Zuideveld v. U.S., 316 F. 2d 873, writ of certiorari denied, 376 U.S. 916, 84 S. Ct. 671, 11 L. Ed. 2d 612 (Feb. 17, 1964);

Harry Fried v. New York (paperback books: "College for Sinners" "Sex Cat" and seminude photographs of women), 238 N.Y.S. 2d 742, appeal dismissed for lack of jurisdiction. Treating the papers wherein the appeal was taken as a petition for writ of certiorari, certiorari is denied (Justices Black, Douglas and Stewart are of the opinion that probable jurisdiction should be noted and judgment reversed), 378 U.S. 578, 84 S. Ct. 1904, 12 L. Ed. 2d 1033 (June 26, 1964);

Samuel Dodd Williamson v. California (paperback book: "Fear of Incest"), 207 Cal. App. 2d 839, 24 Cal. Rptr. 734, writ of certiorari denied (Justice Doulas voted to grant certiorari), 377 U.S. 994, 84 S. Ct. 1902, 12 L. Ed. 2d 1047 (June 22, 1964), rehearing denied .... U.S. ...., 85 S. Ct. 13, 13 L. Ed. 2d 77 (Oct. 12, 1964);

Harold Eugene Wenzler, Sr., and John Imlay v. California (8 mm movie, 12 minutes—"First Fling" described as girlie magazine subjects in motion) writ of certiorari denied (Justice

Douglas voted to grant certiorari), 377 U.S. 994, 84 S. Ct. 1902, 12 L. Ed. 2d 1047 (June 22, 1964), rehearing denied, ... U.S. ...., 85 S. Ct. 14, 13 L. Ed. 2d 77 (Oct. 12, 1964).

There is rarely any mention made in a trial court or in a State Supreme Court of any of the criminal convictions, which this Court has refused to reverse, or the obscene matter involved in those cases. The rare exception is *Connecticut v. Andrews,* 150 Conn. 92, 186 A. 2d 546 (1962), which, in answer to the defendant's claim that the girlie magazines "Modern Man" (July 1960) and "Modern Man—Yearbook of Queens" were not obscene, said:

> "The defendant's claim that there were no obscene magazines to support his conviction on the first and second counts is without merit. Monfred v. State, 226 Md. 312, 317, 173 A. 2d 173, Cert. denied, 368 U.S. 953, 82 S. Ct. 395, 7 L. Ed. 2 386; State v. Chobot, 12 Wisc. 2, 110, 116, 106 NW2 286, dismissed, for lack of a substantial federal question, 368 U.S. 15, 82 S. Ct. 136, 7 L. Ed2 85. . . ."

The end result it that the people's cause suffers. The bad cases are highlighted and the good cases go unnoticed.

The Connecticut Supreme Court has recognized what in our opinion appears to be good logic and good law. If the United States Supreme Court must, in each instance make a constitutional judgment as to whether any given subject matter is either, as a matter of law, protected speech; or a question of fact on the issue of obscenity, for the jury to decide, then a denial of review

(either by dismissal of an appeal or by denial of certiorari) places the material in the latter category.[14]

F. Reconciling the Cases.

When the obscenity statutes have been applied as *criminal statutes* trying "conduct," the People's case has met with no opposition from the United States Supreme Court, except in the case of *Jacobellis v. Ohio,* 378 U.S. 184, 84 S. Ct. 1674. Unfortunately, the United States Supreme Court has failed to publicize such results by way of formal opinion.

Justice Warren, in his dissenting opinion, in *Jacobellis v. Ohio,* 84 S. Ct. 1674 (June 22, 1964), makes it clear that this Court is not defending obscenity, but that *it only appears to do so* when it is faced with procedurally bad cases, at page 1685:

> "There has been some tendency in dealing with this area of the law for enforcement agencies to do only that which is easy to do— for instance, to seize and destroy books with only a minimum of protection. As a result, courts are often presented with procedurally bad cases and, in dealing with them, appear to be acquiescing in the dissemination of obscenity. But if cases were well prepared and were conducted with the appropriate concern for constitutional safeguards, courts would not hesitate to enforce the laws against obscenity."

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[14]The general rule of law that denial of certiorari means "nothing" or "nothing much," would seem to have little application in free speech cases. See *Supreme Court Practice,* 3rd Ed., Stern and Gressman, P. 182, where the authors discuss this point in writs of habeas corpus cases.

Our analysis points to a major point of distinction between those cases which draw into issue the conduct of an individual and those which involve "prior restraint." The final results have certainly been distinguishable. The seven year history points to a course of conduct which has meaning.

The "procedurally bad cases" referred to by Justice Warren were not criminal cases involving "conduct" but were the cases cited in footnote 5, involving "prior restraint." Where difficulty has been encountered, it has been in the area of "prior restraint" by administrative officials (motion picture censor boards and Postmaster cases and mass seizures under search warrants). "Due process" considerations were a major issue in such cases. See here, the four *Per Curiam* decisions in 1958 (prior restraint—no jury trial on the issue of obscenity; material kept from mails in preference to criminal trial for disseminating obscene material, vendor required to prove his right to distribute by injunctive action); *Marcus v. Kansas City Search Warrants,* 367 U.S. 717, (prior restraint—mass seizure under general search warrant, non-criminal proceeding aimed at destruction of subject matter rather than at conduct of vendor); *Bantam Books, Inc. v. Sullivan,* 372 U.S. 48 (prior restraint—boycott, rather than criminal trial of vendor); *Manual Enterprises, Inc. v. Day,* 370 U.S. 478 (prior restraint—material kept from mails in preference to criminal trial for disseminating obscene material, vendor required to prove right to distribute by bringing an injunctive action); *A Quantity of Books v. Kansas,* 84 S. Ct. 1723 (prior restraint—mass seizure, non-criminal proceedings aimed at destruction of subject matter, rather than at conduct of vendor, no right to jury trial on issue of obscenity). *Freedman v. Maryland,* 380 U.S. 51 (prior restraint—movie censor board, exhibitor required to prove his right to exhibit by injunctive action);

Trans-Lux Distributing Corp. v. Board of Regents of New York, 380 U.S. 259 (prior restraint—movie censor board, exhibitor required to prove his right to exhibit by injunctive action).

In all of these cases, the People could have brought the criminal action and held the defendant accountable for his "conduct" (with the procedural safeguards of criminal procedure, *i.e.,* jury trial and burden of proof) and avoided the prior restraint issue. They chose the "prior restraint" attack in preference, unaware that this Court's policy was to give *Near v. Minnesota* as narrow a construction as possible. Unfortunately, the disinterested prosecutor pictured above, at this late date, is unaware of this basic distinction in the case law. Furthermore, he is unwilling to pursue the distinction, without a more direct signal from this Court.

The appeal herein places in issue the very foundations upon which the obscenity laws draw their life. "Fanny Hill" has had widespread recognition in the underground trade as a classic in pornography, and appellant is its publisher.[15] Although as in rim civil action, rather than a criminal case, it has none of the previous restraint defects found objectionable in *Kingsley Inc. v. Brown* (*supra*). Further, appellant had the right to a jury trial, which he elected not to claim.

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[15]The reporter's comments in the American Law Institute, Model Penal Code (1957 draft) section 207.10 at page 13:

> "The main purpose of Section 207.10 is to suppress commerce in the obscene. If production and circulation of obscene material for gain can be eliminated, the supply would be cut off at the source . . ."

II.

THIS COURT SHOULD AFFIRM THE JUDGMENT.

A. "Fanny Hill"—A "Leveler" of the Issues.

It is poetic justice that "Fanny Hill" should find its way into the court room for consideration as an abstract idea at the same moment in history that this High Court has before it for review cases involving the conduct of Ralph Ginzburg and Edward Miskin dealing with related matters. Without this book and its history, those cases would lose their reality alongside the semantic adventures in case law which have flooded this nation's court rooms in the eight years of distortion which have followed *Roth-Alberts, supra.* The presence of "Fanny Hill" acts as a poultice to draw this Court's attention to the real substantive matters which are at stake—the concern of government and courts of justice over the corrosive effects which weigh against the people's sense of sexual morality and the sovereign right of a state government to control conduct relating thereto.

Even in this Court's majority opinion in *Roth,* the realities of the moment[16] were barely discernable.[17]

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[16]Roth received a 5-year jail sentence, Alberts a 60-day jail sentence. Putting aside the theoretical arguments of how this Court acts in certiorari (Roth) and appeals (Alberts) matters on the federal questions raised in jurisdictional statements, amicus have too great a respect for appellate justice not to be convinced that the 1957 Court did pass on the subject matter. Failure to do so under such circumstances would be an admission that justice is blind and little better than that received in a trial court from the hands of a prejudiced jury which refuses to convict on proper evidence. We prefer to believe that the majority did look at the subject matter, and under the test approved by the Roth author in his dissenting opinion in *Kingsley Book Inc. v. Brown,* 354 U.S. 436, 448, agreed with the trial judge that such materials presented a fact question, exclusively for the consideration of the trial court, *i.e.,* that reasonable men may differ whether the material is obscene. Footnote 8 in *Roth,* at page 481 that

It was almost as though Samuel Roth and David Alberts did not exist. What the defendants were doing in those cases, and society's right to concern itself with such conduct—these historical facts and issues were forgotten. It is the tragedy of that case that the two concurring opinions which supplied the missing quantity[18] were thereafter to be responsible for distortions[19] in mean-

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"No issue is presented in either case concerning the obscenity of the material involved" is consistent with this construction of the case.

[17]The actual morai issue was treated superficially by the majority opinion. It merely confirmed the historic precedents, noting the Chaplinsky reference to "social interest in order and morality" and recorded the judgments of history which rejected obscenity. As "mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, the obscenity laws of all of the 48 states, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956."

[18]That the corrosive effects weighing upon the people's sense of sexual morality are a proper concern of government. Justice Harlan asked at page 501: "What, then, is the purpose of this California statute? Clearly the state legislature has made the judgment that printed words can 'deprave or corrupt' the reader —that words can incite to antisocial or immoral action' The assumption seems to be that the distribution of certain types of literature will induce criminal or immoral sexual conduct." Answering this he said: "The state can reasonably draw the inference that over a long period of time the indiscriminate dissemination of material, the essential character of which is to degrade sex, will have an eroding effect on moral standards. . . ."

Justice Warren said at page 495: "The defendants in both these cases were engaged in the business of purveying textual or graphic material openly advertised to appeal to the erotic interest of their customers. They were plainly engaged in the commercial exploitation of the morbid and shameful cravings for material with prurient effect. I believed that the State and Federal governments can constitutionally punish such conduct. That is all that these cases present to us, and that is all we need to decide. . . ."

[19]For example, the closing arguments of appellant's attorney where he said concerning the concurring opinions [R. 95] . . . "The Court considered only that question. It did not consider whether the materials involved were in fact obscene or in law obscene. It considered only that single question, can anti-obscenity legislation under any circumstances have a constitutional

ing of the majority opinion, which the concurring opinions in no way intended.

As a consequence of a willingness of courts to dwell exclusively upon the *Roth* formula and to forget the reasons therefor, we find that the simple test formulated in *Roth-Alberts, i.e.,* that material is obscene when the dominant theme is an appeal to prurient interest, has been distorted out of reason with measurable success in both trial and appellate courts and is being urged at great length now in this Court as to the very object against which the rule was originally applied. Such become the vagaries of the law, when the rule overshadows the reason[20] for the law.

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application? The answer of a majority of the court was Yes. *Four judges dissented.* . . . The five judge majority, however, said Yes with a very important qualification, and that was that such statutes have only the narrowest application. . . ." (Our emphasis.) The statement is fallacious. The concurring opinions were just that, making it more like a 7-2 majority. Yet the trial judge's reasoning was momentarily distorted, for after the closing arguments his offhand statement was [R. 100]: "This is the type of case where, as counsel pointed out, there is a great deal of difference of opinion as to facts and the weight to be given. The United States Supreme Court decided on a 5-4 decision. . . ."

[20]The reason of the law is the life of the law; for though a man can tell the law, yet, if he know not the reason thereof, he shall soon forget his superficial knowledge. But when he findeth the right reason of the law, and so bringeth it to his natural reason, that he comprehendeth it as his own, this will not only serve him for the understanding of that particular case, but of many others. Coke, First Institute 183. "The corrupting influence on order and morality must be kept in mind in considering obscenity. To lose sight of the objective of the law by narrowly considering only the prurient appeal aspect of the obscenity law is to become so enamored with a means as to lose sight of the end. Obscenity is prohibited not just because it excites the sexual appetite but rather because such excitation has a "corrosive effect upon the public sense of sexual morality. The goal of the law is the protection of the public interest in order and morality." Censorship, Government, Obscenity, Terrence Murphy, Helicon Press, p. 183.

It is not accidental that "Fanny Hill" should appear again on the scene at this moment. Such reasonably was to be expected as a natural consequence of the distortions which have crept into the obscenity laws in the years since *Roth,* and the cycles which occur in history. On this latter point, it has been well observed that, if a nation is to be assured of its continuance, its people must look backwards and take note of the lessons of history.

B. The Common Law Court's Reaction to Obscenity and "Fanny Hill".

Two centuries removed from the Common Law origin of the obscenity crime, this nation finds itself in the same straits which required the English Common Law Courts to "create" the obscenity laws originally. A tide of printed filth is advancing across the land in a way which should give every wholesome thinking person cause to wonder whether it may not erode the very foundations of the basic morality upon which our nation and our Constitution were founded. A leading educator recently observed that we are the *first* generation of Americans to permit our authors and playwrights to wallow in filth. The history of England has completed its cycle, reappearing in the English-speaking "New World". "Fanny Hill" has been a part of both cycles.

Appellant himself, in his defense of "Fanny Hill", draws this Court's attention to the historical reference and precedence which should decide the merits of this and the other obscenity matters which are on this Court docket. In his testimony, Mr. Konigsberg [R. 89] called the trial court's attention to the cyclic reference to which we refer, albeit with a different connotation.

His reference to the year in which Cleland wrote, as a part of a "cultural battle concerning life" was for the purpose of attributing "historic value" to the book in an attempt to redeem it from its obscenity. It was, in his words, a part of the transitional period in the cycle from the 17th Century Commonwealth Period, with its extreme suppression of freedom of life, to the Restoration Period, with its excessive kind of libertine life and excessive sexual freedom, and the 18th Century Purtianical reaction, with its emphasis upon chastity as a reaction to the Cavalier attitude of the Restoration Period. In his view, Cleland's writings were a "reaction" to the mores which were taking shape in the year 1749.

We refer to the same cycle, but for a different purpose—that of inviting this Court's attention to the manner in which the Common Law courts of that era reacted to the identical problem that appellant publisher presents in this appeal. The association, of course, is quite relevant, for it was from this heritage that our nation and the State of Massachusetts received its obscenity laws.

The middle class reaction to the Restoration ribaldy that took place in England at the turn of the century followed much the same pattern as society has in its "reaction" today. The governmental control of the excesses of the individual was not through the licensing acts which were allowed to lapse in 1695 but rather through the Common Law, which held each citizen accountable for personal conduct which affected public morals.

In the early 1700's "the reputable literature of the time was often very broad, and pornographic works cir-

culated freely."[21] "In London, where various trades and businesses tend to flock together, the pornographic shops were mostly on Holywell Street. . . . It is not known who first had the notion that publication of obscenity might be a violation of the English Common Law. But in 1708 he managed to have a printer named Reid called before a grand jury for producing a pornographic book entitled 'The Fifteen Plagues of a Maidenhead' . . . it was a typical example of the new commercial smut."[22] The first reported obscenity conviction, in *Regina v. Reid* (1708), 11 Mod. Rep. 142, came before Judge Sir John Holt who ruled that nothing in the law, common or statute, could warrant an indictment against even the filthiest book. He wished there were, but he could not make law. And so Mr. Reid went free.

The Common Law, however, was and is a living thing and it breathed new life for the community when the case of Edmund Curl came before the courts in 1725. The book for which Curl was arrested, "Venus in the Cloister, or the Nun in her Smock," had been in print for 50 years or more The magistrate convicted Curl. This time, on appeal, the prosecutor argued[23] that to corrupt the morals of the king's sub-

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[21]Suppressed books. Alec Craig. Copyright 1963 by The World Publishing Co. at page 33.

[22]The Erotic in Literature, David Loth, a MacFadden Book, 1961, at page 104.

[23]"3. As to morality. Destroying that is destroying the peace of the Government, for government is no more than publick order, which is morality. My Lord Chief Justice Hale used to say Christianity is part of the law, and why not morality too? I do not insist that every immoral act is indictable, such as telling a lie, or the like; but if it is destructive of morality in general, if it does, or may, affect all the King's subjects, it then is an offence of a publick nature. And upon this distinction it is, that particular acts of fornication are not punishable in the Temporal Courts, and bawdy-houses are. In *Sir Charles Sedley's*

jects was an offense at Common Law. *If you destroy morality, you destroyed the peace of government.* In upholding the conviction, the King's Bench established for the first time the crime of obscene libel as a misdemeanor. *Rex v. Curl* (1727), 2 Strange 788. The state and the law out of necessity had forged a tool ready to meet the community's need at that time for controls against obscene material.

It was no accident therefore that Cleland, 22 years later, found himself in difficulty when his "Fanny Hill", published anonymously,[24] appeared on the market in 1749. In "Copies Taken From the Records" is found under date of November 8, 1749, a warrant for the seizure of "a most obscene and infamous book entitled The Memoirs of a Woman of Pleasure."

George Ryley Scott gives this account in his book, "Into Whose Hand" at page 143:

> "When Cleland was summoned before the Privy Council for writing an obscene book and pleaded poverty as an excuse, the Earl of Granville, who, at the time, was president of the Council, granted him a pension of 100 pounds a year on condition that he did not write any more literature of this type."

Ralph Griffiths, Cleland's publisher, was the first smut peddler to make a fortune in the trade, and he did it on "Fanny Hill". It is also noted that the first criminal penalty in the over 214 years of suppression of "Fanny

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case it was said, that this Court is the custos morum of the King's subjects. 1 Sid. 168." . . . *Rex v. Curl*, 2 Strange 789, at 790.

[24] "'Printed for G. Fenton in the Strand' but of Fenton nothing else is known—almost certainly he did not exist. . . ." Fanny Hill, Putnam edition 5555, 1963, Introduction, page VII.

Hill" which followed, was suffered by one Drybutter, a distributor of "Fanny Hill", who in 1757 was sentenced to the pillory.[25]

Today, in the shadow of this history and at a time when this nation is visited with problems[26] that parallel those which existed in England in 1749, appellant appears in this High Court with his argument that the concern of government and the courts of justice in Massachusetts over the corrosive effects which weigh against the people's sense of sexual morality do not transcend his personal right to publish for profit. We ask this Court to take its guidance from the Common Law principles.

C. Intervenor and Other "Fanny Hill" Publishers Have "Cleland" Attitudes.

Nor is appellant alone in this court room. With him today as real parties in interest though not named, are the ghosts of other contemporary publishers who enjoy in common, lesser reputations than that of this publisher. All, however, are joined in their endeavor to capitalize commercially on the erotic qualities of "Fanny Hill."

Lest this Court misconceive the nature of the inquiry, by virtue of the appearance here of a "Fanny Hill" publisher under the disguise of an "old line publishing company," it must be emphasized that their move into the production of erotic literature was not without calculation. Appellant's recent publications of "Candy,"

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[25]Fanny Hill, Putnam edition 5555, 1963, Introduction, page VIII.

[26]In comparison, the obscenity problem in the United States is infinitely greater than that which existed in England in the 1700's due to the modern advancements of the high speed press, rapid transportation, ease of access to channels of distribution, easy credit, availability of the purchasing dollar, etc.

"Krafft-Ebbings Psychopathia Sexualis", "Perfume Garden", and "Ananga Ranga", place it alongside a formidable array of nondescript publishers who, for commercial profit, are bent upon pushing back the line between candor and shame beyond that which is acceptable to the community. Their interest is not centered on free speech, but rather in their commercial interests in profit arising out of copyright interest, and the historic saleability of pornographic material.

In *Putnam & Sons v. Lancer Books, Inc.,* 239 F. Supp. 782, appellant brought suit against Lancer Books and others for "pirating" their rights to a monopoly on "Candy",[27] a piece written for French pornographer Girodias in 1958. In the Illinois trial of Putnam's Son's "Fanny Hill", *Illinois v. Paul Romaine,* the defense attorney clarified the testimony of Mr. Walter Minton, president of Putnam & Sons, as to the circumstances surrounding Putnam's publication of "Krafft-Ebbings Psychopathia Sexualis". A rival publisher, Greenleaf Publishing Company,[28] had "beaten" them

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[27]Putnam & Sons, Lancer, Brandon House, All Star, Greenleaf Classics, Sundown Readers, and Ampoc published "Candy."

[28]More recently the same publisher, Greenleaf Publishing Company, has been found guilty of copyright infringement in a New York Federal District Court. Judge John R. Bartels held they pirated the translation of French author M. Genet's "Thief's Journal" from Grove Press. Also named as defendants in the Grove Press suit were William L. Hamling and Frances Hamling, Greenleaf Publishing Company owners, New Cal Publication Inc. of Gardena, California, and Reed Enterprises, Inc. of San Diego, its national distributor, also indicated in Houston, Tex., on September 11, 1965, for publishing Nightstand Books "Orgy Club," "Sin Summer," "Shame Hunger," "Temple of Shame," "Virgin Inc.," "Passion Carousel," and "Swap Sect.' Greenleaf Publishing Company was taken to task this Spring by a reviewer writing in the Books Section of Women's Wear Daily. The reviewer wrote that Grove Press, publisher of Miller's novels had just "learned to its horror" that a private publisher, an adjunct of a girlie magazine called Rogue, was ready to distribute a

to the publication. "I know it was Putnam's intention to be the first on the stand with this but when it was announced that Putnam's was going to bring out an edition of Krafft-Ebbings, Putnam's original intention was to bring out a hard cover edition . . . then, I believe Greenleaf had its own translation made . . . and Greenleaf got on the stand after this was printed but before it was published . . . and Greenleaf was the first unexpurgated edition out on the stand."

The Putnam & Sons edition of "Fanny Hill" which received court attention in New York, New Jersey, Illinois and Massachusetts is not the only "Fanny Hill" edition on the open market today, which will be affected by this Court's ruling.[29] In truth, the people's cause for decency in community standards is more in danger from the manner in which this case will affect those publishers and their other products.

Typical of the publishers of "Fanny Hill" which preceded Putnam & Sons, was the fly-by-night publisher Richard J. Haddad, *California v. Haddad, Forti* (Los Angeles Superior Court Case 27504, unreported). See also *Haddad et al. v. Superior Court of Los Angeles County,* 32 Cal. Rptr. 120 (July 10, 1963). Haddad manufactured materials in three classifications: sado-masochistic material like "Bound in Rubber", "Female Sultan", "Whip and Lash", "Bondage Slave", and "Bondage Discipline at Bondhaven". A step lower, he reproduced such paperback gems as "Rape Me Again", "Incest for Renee", and "Sex Life of a Cop". At the

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2-volume paperback edition of Miller's novel, "Sexus." The reviewer added that Grove Press, which had planned to publish "Sexus," immediately issued a 1-volume paperback edition of the work, priced at 65c less than the Greenleaf edition.

[29]See note 30.

bottom of the rung were the paperbacks, "Devil's Advocate", "Head Humper", "Down She Goes", "Venus in India", "Memoirs of Josephine Mitzerbacker", "Three Times a Woman Gruschenka", and "Memoirs of Fanny Hill". The manuscripts from which Haddad worked had a "French import" look and were graphically illustrated. His publishing operations consisted of deleting the photographic illustrations, renumbering the manuscript pages, and reproducing the same by lithography. He had completed "Down She Goes", "Head Humper", and "Devil's Advocate", and was about to reproduce "Fanny Hill" when on November 30, 1962, the Los Angeles County Sheriff's Vice ended his operation. A Los Angeles jury in January 1964 found Haddad and Forti guilty of conspiracy to print, publish, etc. obscene materials in *California v. Haddad, Forti* (S.C. 27504).

The number of persons who preceded Haddad as publishers of "Fanny Hill" belong to a legion of the unknown. Those who were successful would not risk their trademarks on their product. The unsuccessful who ran athwart the law, rarely ventured beyond the state of pleading "guilty", in recognition of the astronomical odds which ran against them in the trial court. Hence, the appellate courts do not record their names. The intervening two centuries since 1749 are crowded with people who longed for the anonymousness which appellant and others now consider demeaning to their product.

Some (but not all) of the "Fanny Hill" competitors of G. P. Putnam & Sons are: Brandon House (P. 901),[30] owned by Milton Luros of 7311 Fulton Street,

[30]On February 14, 1964, the Attorney General of the State of Rhode Island filed an *in rem* civil action against "Fanny Hill,

Los Angeles, California, also a publisher of girlie magazines, nudist magazines and sex (predominantly lesbian type) paperbacks; All Star (AS 10), owned by Edwin A. Schnepf of 10539 Burbank Blvd., Los Angeles, California, also a publisher of girlie magazines, nudist magazines, sex tabloids and sex paperback books, and Fitz Publishing Company, Los Angeles, California, distributed nationally by Golden State News (GSN) owned by a publisher and distributor of girlie magazines, nudist magazines and sex paperback books.

It was no coincidence that in October 1963, concurrently with the California decision holding "Tropic of Cancer" not obscene,[31] a paperback book entitled

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Memoirs of a Woman of Pleasure" published by Brandon House (American Art Agency Inc., dba Brandon House) of 7311 Fulton Avenue, North Hollywood, Calif. On February 27, 1964, Judge John E. Mullen of the Providence Plantation Superior Court made a written finding that "there is reasonable cause to believe said book is obscene," and issued a temporary restraining order. American Art Agency, Inc., a California corporation, made a special appearance on March 17, 1964, and filed a stipulation continuing the temporary restraining order in effect, under which, time for filing special pleas was extended to May 25, 1964. No answer was filed until January 19, 1965, when publisher's attorney filed two answers: one for American Art Agency, Inc., the California corporation, denying the book is obscene, and the other for other respondents, denying the book is obscene and challenging the provisions of the statute (failure to provide for a jury trial, failure to set a standard for obscenity, challenging the provision which allows the court to except from its judgment a restrictive category of persons to whom the book may be sold or commercially distributed, challenging "County" standards, etc.). *J. Joseph Nugent, Attorney General of Rhode Island v. Fanny Hill* (Providence Plantations Supreme Ct. M.P. 6467). The Brandon House edition was being distributed by Books Inc. of Providence, a recognized distributor of sex materials. On December 17, 1964, a federal jury found Books Inc. guilty of the interstate shipment of an obscene paperback, "Lust Job," in violation of 18 U.S.C.A. 1462.

[31]On July 2, 1963, the California Supreme Court entered its judgement in *Zeitlin v. Arnebergh*, 59 Cal. 2d 901, 383 P. 2d 152, holding Tropic of Cancer "not obscene" in a declaratory judgment action and reversing a contrary decision in the trial court

"Fanny Hill", published by Brandon House of 7311 Fulton Avenue, North Hollywood, California, appeared on the newsstands in Los Angeles and throughout the nation. At about the same time, the paperback edition of Putnam & Sons also appeared. When asked as to why the book was being sold, one newsdealer replied: "We have been selling it ever since 'Tropic of Cancer' has been put back on the racks."

A short time later, in January 1964, a paperback book entitled "Fanny Hill" (AS 10), published by All Star Books of 10539 Burbank Blvd., North Hollywood, California, appeared on the newstands in Los Angeles and throughout the nation.

Much later in 1965, following the dismissal by the Los Angeles District Attorney's office of an action against All Star's "Fanny Hill" (*infra*), another paperback edition of "Fanny Hill" published by Fitz Publishing Company of Los Angeles, California, and distributed nationally through Golden State News (GSN) appeared on all newsstands.

On April 21, 1964, the Los Angeles County Grand Jury returned felony indictments against 14 persons for conspiracy to print, publish, etc., "Fanny Hill" and eight other paperback books in violation of the California obscenity laws in *California v. Schnepf, et al.*, SC 289205. The books named in the indictment were: "Beds of Canyon Grove" (AS 3), "Sin Island" (AS 4), "Wild Women of Wolf River" (AS 5), "Women

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and in the District Court of Appeal. On July 31, 1963, a petition for rehearing was denied. On October 26, 1963, the City Attorney of Los Angeles filed a petition for certiorari, which was denied, in *Zeitlin v. Arnebergh*, 375 U.S. 957 (Dec. 16, 1965).

of Beaver Mountain" (AS 6), "Girls in the High Spike Heels" (AS 7), "Suburban Sex Pots" (AS 8), "Route 69" (AS 9), "The Love Teacher" (AS 11), and "Fanny Hill" (AS 10). Motions to dismiss the Schnepf indictments were denied in the Los Angeles Superior Court. A writ of prohibition was denied by the District Court of Appeal, 2nd Appellate District, and a petition for a hearing was denied in the California Supreme Court.

The All Star "Fanny Hill" (AS 10) did not go to trial in the *Schnepf* case, however. In March 1965 a new District Attorney struck "Fanny Hill" from the indictment, conceding without trial, that the same was not obscene. The Los Angeles jury in hearing the case on the five books which were submitted to them, found them all to be obscene. All Star reprinted "Fanny Hill" after the jury verdict was rendered on the other books and the indictment as to "Fanny Hill" was dismissed.

On October 21, 1964, the Los Angeles County Grand Jury returned felony indictments against 15 persons for conspiracy to print, publish, etc., obscene matter in violation of the California obscenity laws in *California v. Milton Luros, et al.*, SC 295183. Count 2 of the indictment included "Fanny Hill" and 8 other paperbacks, "Lesbian Sin Song" (P. 606), "Two Women in Love" (P. 619), "Counterfeit Lesbian" (P. 623), "Lesbian Captive" (P. 624), "Lesbians in White" (P. 627), "The Girls at Wendy's" (P. 707), 'The Three Way Apartment" (P. 710), "Honey Lips" (P. 713), and "Fanny Hill" (P. 901).

The Brandon House "Fanny Hill" (P. 901) did not go to trial in the *Luros* case, either. Two months after the indictments were returned, the new District Attorney similarly voluntarily struck "Fanny Hill" from

the indictments, conceding that the same was not obscene.

D. The Reason for This Nation's Obscenity Laws.

Curl's case arose out of the people's reaction to the sexual excesses and the libertine life of the Reformation Period. Destroying morality was destroying the peace of the government, for government is no more than public order, which is morality. *Rex v. Curl (supra)*. Obscene libel was declared to be a common law misdemeanor, and this in turn has become a fundamental part of the law of the states which make up this union, either through the common law, *Commonwealth v. Sharpless* (1815), 2 S and R 91, 7 Am. Dec. 632, or by statutory proscription, *Roth-Alberts* (*supra*). To deny its reasonableness is to disregard our inheritance.

Several hundred years ago, one of Cleland's contemporaries (though not of his philosophy) wrote in simple verse the clearest statement of "why" government acts to outlaw obscenity. In 1705, Alexander Pope wrote in his quatrain on "The Monster Vice":[32]

> Vice is a monster of so frightful mien
> As to be hated, only needed to be seen.
> Yet seen too oft, familiar with her face,
> We first endure, then pity, then embrace.

The function of the obscenity laws is not, as is so often suggested by those opposed to such laws, the eradication of that social evil which *directly* causes anti-social conduct.[33] Nor even that social evil which "probably" or "possibly" is the cause of such anti-social con-

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[32]We think it applies to 'Tropic of Cancer." See *Besig v. U.S.*, 206 F. 2d 142, 147 at footnote 5.

[33]*Roth-Alberts*, 354 U.S. 476, 486.

duct. Neither does it concern itself primarily with the danger that children may come into contact with the material.[34] Rather the law's concern is with the more generally accepted historical notion,[35] that a society in which obscene material is readily available for its members is not a healthy society and is heading downhill.

A nation which is preoccupied with sex is thought to be "sick." The ultimate evil would be a society in which sex pictures, novels, and magazines, are available at every store, sex pictures on every marquee, sex movies in every theater, sex pictures in every art gallery and sex language in every dialogue. To the extent that we approach this status by degrees, we recognize we are losing control of public order and we are closing the gap on the community of "Sodom and Gomorrah." The anti-social conduct of today's society becomes the socially acceptable conduct of the new community.

Louis B. Schwartz, co-reporter of the Model Penal Code explains the governmental function of the obscenity crime in society as follows:[36]

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[34]But see *Jacobellis v. Ohio* (Opinion of Justice Brennan, concurred in by Justice Goldberg), 378 U.S. 184, 84 S. Ct. 1676, 1682, 12 L. Ed. 2d 793.

[35]The existence of obscenity is the symptom of a disorder which probability teaches us, will lead to ruin. Arnold Toynbee, the historian, tells us that 19 of the 21 great civilizations which flourished in world history, crumbled into ruin—not because of armed aggression from without, but because of moral decay from within.

In sum, the case for the governmental action taken by the State of Massachusetts was stated by U.S. Supreme Court Justice Harlan in his concurring opinion in *Roth-Alberts* (*supra*) at page 502:

> "The State can reasonably draw the inference that over a long period of time the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on moral standards. . . ."

[36]Columbia Law Review, Morals Offenses and The Model Penal Code, Louis B. Schwartz, at 671, 672, 681.

". . . the great majority of people believe that the morals of 'bad' people do, at least in the long run, threaten the security of the 'good' people. . . . It is hard to deny people the right to legislate on the basis of their beliefs not demonstrably erroneous, especially if these beliefs are strongly held by a very large majority. The majority cannot be expected to abandon a credo and its associated sensitivities, however irrational, in deference to a minority's skepticism."

"If unanimity of strongly held moral views is approached in a community, the rebel puts himself, as it were, outside the society when he arranges himself against those views . . . the community cannot be expected to make (his) first protests respectable or even tolerated by the law. . . ."[37]

". . . But equally, it is not merely sin-control of the sort that evoked Professor Henkin's constitutional doubts. Instead, the community is merely saying: 'Sin, if you must, in private. Do not flaunt your immoralities where they will grieve and shock others. If we do not impose our morals upon you,

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[37]The gravest amount of harm is being accomplished by a misapplication of the majority opinion in *Kingsley International Pictures, Inc. v. Regents*, 360 U.S. 684, 79 S. Ct. 1362, 3 L. Ed. 2d 1512 (1959) in this area. See Justice Brennan's Opinion in *Jacobellis v. Ohio*, 84 S. Ct. 1676 at 1680. Perversions like incest are being presented in the voyeur manner of Fanny Hill's Peeping Tom incident in the inn, under the argument that such is speech in the form of "controversial sex talk." Subject matter whose sole advocacy is deviation from accepted sexual norms, which by its unorthodoxy and manner of presentation is prurient in nature to the "average" person in the community *is* proscribed by the obscenity laws, and this Court should make that point clear to undermine the possibility of arguments from *Kingsley International Pictures, Inc.* (*supra*) to the contrary.

> neither must you impose yours upon us, undermining the restraints we seek to cultivate through family, church, and school.' *The interest being protected is* not, directly or indirectly, the souls of those who might be depraved or corrupted by the obscenity, but *the right of parents to shape the moral notions of their children, and the right of the general public not to be subjected to violent psychological affront.*" (Our emphasis.)

We contend that strong obscenity law enforcement can assist in reversing the trend in the type of anti-social sexual misconduct, which is widespread in the nation today. Certainly the history in Cleland's time bears this out. Alec Craig writes:[88]

> "Before the end of the eighteenth century an astonishing change had come over English literature. From being as outspoken as any other it had become so straitlaced as to be a historical curiosity. . . ."

The change in the Common Law Court's attitude to the obscenity laws had its effect on private writings and most likely, the social conduct of the community,[89] tho indirectly, for the standards in the community did change thereafter from the previous sexual excesses, which had previously existed.

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[88]Suppressed Books, Alec Craig, copyright 1963 by The World Publishing Co. at page 35.

[89]We have witnessed the reverse of this in the United States in recent years. A weak attitude on the part of the courts toward obscenity law enforcement has been accompanied by a proportionate increase in anti-social sexual behavior.

E. "Fanny Hill" is Obscene.

1. The Roth-Alberts Standards.

(a) *General.*

The majority opinion in *Roth-Alberts* (*supra*) approved three definitions of the word "obscene" as being within the constitutional standard, which itself was set forth in a fourth test.

The federal court sponsored test in *Roth* and the State Court sponsored test in *Alberts* were set forth at page 486:

> "In *Roth,* the trial judge instructed the jury: 'The words obscene, lewd and lascivious as used in the law, signify that form of immorality which has relation to sexual impurity and has a tendency to excite lustful *thoughts.*' (Emphasis added.) In *Alberts,* the trial judge applied the test laid down in *People v. Wepplo,* 78 Cal. App. 2d Supp. 959, 178 P. 2d 853, namely, whether the material has 'a substantial tendency to deprave or corrupt its readers by inciting lascivious *thoughts* or arousing lustful desires.' "

The court thereafter held both tests to be within the constitutional standard, when given with proper jury instructions relevant to the dominant theme and proper audience.

The majority opinion gave approval to the definition found in the A.L.I. Model Penal Code, Section 207.10-(2) (Tentative Draft 1957) and noted no significant difference between this and the meaning of obscenity developed in the case law at page 486, footnote 20:

> ". . . A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest,

> i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters . . . See Comment, *id.*, at 10, and the discussion at page 29 *et seq.*"

Justice Brennan expressed the constitutional standard in a fourth definition, in these words at page 489:

> "Some American courts adopted this standard but later decisions have rejected it and substituted this test: Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. The *Hicklin* test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press. . . ."

The most recent separate pronouncements of the majority of the individual justices of this Court in *Jacobellis v. Ohio* (*supra*) have indicated no intention to depart from the express holdings of the *Roth* case. Jacobellis was a no clear majority decision (See Argument IC). There was no opinion of the court.

Justice Brennan expressed his reaffirmance, concurred in by Justice Goldberg, at page 1680:

> "Recognizing that the test for obscenity there . . . is not perfect, we think any substitute would raise equally difficult problems, and we therefore adhere to that standard. . . ."

Chief Justice Warren, with whom Justice Clark joined, said at page 1685:

> "In light of the foregoing, I would reiterate my acceptance of the rule of the Roth case. . . ."

Justice Harlan adhered to his view of separate tests for state and federal cases, as amplified in his opinion in *Manual Enterprises, Inc. v. Day (supra).*[40] Justice Harlan said at page 1686:

> "As to the States, I would not prohibit them from banning any material which, taken as a whole, has been reasonably found in state judicial proceedings to treat sex in a fundamentally offensive manner, under rationally established criteria for judging such materials. . . ."

Justice White concurred in the judgment and did not indicate his views, but voted with Justices Warren, Clark and Harlan to deny certiorari in *Grove Press, Inc. v. Gerstein* (*supra*) and *Tralins v. Gerstein* (*supra*).

(b) *Prurient Interest" Is Proscribed.*

Appellants claim that *Roth-Alberts* established three independent tests: prurient interest, patent offensiveness and social value, is without merit. There is a *unity of purpose* in the obscenity statutes, which is to separate and proscribe material whose dominant theme is to prurient interest (sexual expression which is unacceptable to community standards) from the non-prurient material (sexual expression which is acceptable).[41] "Patent offensiveness" is not a part of the *Roth* test. Only

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[40]In *Roth*, Harlan's test was "hard-core pornography." In *Manual Enterprises, Inc.*, at 489, it was "amended" to "patent offensiveness."

[41]*Curl's* case. See Argument II D.

in Justice Harlan's view is this term employed, and then only in Federal cases. "Social value" has importance, but only in so far as it relates to the dominant theme inquiry. Here we have a "Balancing Concept." Is the dominant theme to prurient interest or is the prurient interest submerged in a theme which has social importance? A.L.I. Model Penal Code (1957 draft), Section 207.10 Reporter's Comments.

In our view, most of the confusion arising in the *Roth* test flows from a failure to understand the true nature of "prurient interest". This concept is described with clarity in the reporter's comments to the Model Penal Code:[42]

> "The proposed definition recognizes that there is a *normal* interest in sexual matters, for which it should be lawful to provide satisfaction through works of art as well as scientific and educational writings. . . ." (In contrast) ". . . The prurient interest is an *exascerbated*" (irritating), "morbid, or perverted interest growing out of the conflict between the universal sexual drive of the individual and equally universal social controls of sexual activity. . . ." (Our emphasis.)

The code itself describes the prurient interest as a "shameful interest." Contrary to the popular belief of some, there is no such thing as material whose dominant theme is to "prurient interest" which is "acceptable to contemporary community standards. The terms are mutually exclusive. It is either a prurient interest (unacceptable to standards) or a normal interest (acceptable).

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[42]A.L.I. Model Penal Code, 1957 draft, section 207.10, comments at p. 29.

"Prurient interest" is defined by the existing social norms which are acceptable to the community as standards of conduct. The line between non-pruriency and pruriency is the *narrow* line between candor and shame.[43] How candid may sexual expression be, before it becomes shameful and a danger to the approved standards, which the obscenity laws are designed to protect? We encounter constitutional difficulties because, by its nature, "prurient interest" is defined in fluctuating terms, the line of which, when approached, has a tendency to inhibit expression.

In recognition of the social importance of legitimate expression, which the First Amendment safeguards, the organic law must allow a sufficient leeway in the area of the line, so as not to silence worthwhile expression which might be stifled out of fear of coming too close to the line. This is why a jury[44] and the criminal forum is so ideal in resolving such an issue. When government requires that 12 persons selected in accordance with due

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[43] *United States v. Kennedy*, 209 Fed. 119, 121 (1913); *Volanski v. United States*, 246 F. 2d 842, 845 (1957).

[44] "It would seem that a jury should in each case establish the standard much as they do in cases of negligence." *United States v. Kennerley*, 209 Fed. 119, 121.

"We impose such a duty upon a jury, because the standard they fix is likely to be an acceptable mesne, and because in such matters a mesne most nearly satisfied the moral demands of a community. . . ." *United States v. Levine*, 83 F. 2d 156, 157 (1936).

"The question in our opinion is peculiarly one best left for *nisi prius* determination, perferably by a jury . . ." *Volanski v. United States*, 246 F. 2d 842, 845 (1957).

"The jury represents a cross-section of the community and has a special attitude for reflecting the view of the average person. Jury trial of obscenity therefore provides a peculiarly competent application of the standard for judging obscenity which, by its definition, calls for an appraisal of material according to the average person's application of contemporary community standards." *Kingsley Book, Inc. v. Brown* (*supra*) (Justice Brennan, dissenting.)

process must agree unanimously, and that each one of the 12 must be convinced "beyond a reasonable doubt" that the dominant appeal is to "prurient interest", (not normal, not acceptable to community standards), then there is little danger that legitimate expression, which the First Amendment was designed to protect, will be violated. Appellate courts can be satisfied that the result is sufficiently over the line. This same general safeguard as to criminal penalties is provided in the Model Penal Code requirement that the material must go "substantially beyond customary limits of candor."

(c) *Slight Social Importance Does Not Exculpate.*

Appellant's argument is that the predominant appeal of "Fanny Hill" may be to prurient interest, but if it has any social value, then he has a constitutional right to publish it[45] against the express wishes of the community as reflected in the judgment of its highest tribunal.[46] This interpretation completely disregards *Curl's* case and the reasoning behind obscenity legislation.[47] It flies in the face of previous case law, as reflected in the A.L.I. Model Penal Code (1957 draft), Section 207.10 and reporter's comments thereto.

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[45]"It is the Publisher's position that a book must fail by all of these tests before it may be suppressed. If, in applying any one of them, the result is on the side of free expression, suppression is impermissible." (Jurisdictional Statement, page 15) . . . "Nor is it every publication considered prurient that the statutes can affect; it must be a publication 'utterly without redeeming social importance.' For unless the publication is worthless trash, it is not possible to justify its suppression in the face of a constitution that forbids abridgement of freedom of the press." (Jurisdictional Statement, page 25.)

[46]"Where a work of any value is in issue, the fact that most of the citizenry views it as immoral or offensive cannot justify a forcible silencing." (Jurisdictional Statement, page 26.)

[47]See Argument II D, *supra.*

The very language of the Chaplinsky Court, as approved in *Roth* indicates that speech may have "slight social value" and yet be subject to punishment, because by its nature it is obscene:

> "It has been well observed that *such utterances are . . . of such slight social value* as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . ." (Our emphasis).

The primary inquiry is,

> "What is the predominant appeal of the subject matter as appraised by the average person, in the light of contemporary standards? Are the elements of prurient interest subordinate to other positive values?"

In this regard the reporter for the Model Penal Code states at page 30:

> "The second aspect of the recommended definition requiring that appeal to prurient interest be the *predominant* appeal of the material, recognizes that a work of art or literature may contain elements of prurient interest, which, however, are subordinate to other positive values of the work. Policy as well as constitutional limitations enjoin us to safeguard freedom of expression by *balancing artistic or other merits of a work against the alleged prurient appeal.* . . ." (Our emphasis).

and at page 40:

> "11. *Effect of Artistic or Scientific Merit.* The effect of our proposals on definition of the obscene, consideration of the work 'as a whole,' and admissibility of evidence of artistic and other mer-

its is to permit consideration of positive values of the work in determining whether the predominant appeal of the work is to prurient interest. This does not differ substantially from present law."

and at page 42:

"Our reasons for hesitating to relate the definition of obscenity directly to appraisal of artistic merit are as follows. In the first place, great artistry is not necessarily inconsistent with prurient appeal; consummate skill in execution might be the very thing which lends the work its powerful erotic appeal. . . .

"Accordingly, we have refrained from making artistic or other merit a direct and independent issue in obscenity trials. On the other hand, it is obvious that the issue of 'predominant appeal" involves not only a judgment that the material in question appeals to prurient interest, but also a judgment that it has this characteristic more than any other. Thus consideration is invited to the question of what other appeal, if any, the material has. And in subsection (2) (c) we expressly provide for the admissibility of evidence as to artistic, literary, scientific, educational or other merits.

"The slight but real difference between a defense or justification on the basis of artistic worth and mere permission to introduce evidence of artistic merit as bearing on the issue of 'predominant appeal' may be seen in the possibility, under the later arrangement, of (1) convicting notwithstanding great artistic competence, where the main appeal is to prurient interest; and (2) acquitting notwithstanding that the material has little or no artistic

merit and some, but not much, appeal to prurient interest, in short, is a dull piece with no significant 'appeal', where a trace of the salacious is lost in a sea of inanity.

"The ultimate question is how prominent is the appeal to prurient interest in the work as a whole, whatever the value judgment placed on the balance of the work." (Our emphasis.)

The cases cited by appellant in support of a contrary position at page 15 of his jurisdictional statement relate to the "Tropic of Cancer" decisions in various state tribunals. *Grove Press, Inc. v. Gerstein (supra)*[48] should not be interpreted as changing the "Balancing Rule" expressed above in the Model Penal Code, for this Court has indicated it is following "prior case law" and the A.L.I. M.P.C. See *Roth-Alberts* (*supra*) at page 487, footnote 20:

"We perceive no significant difference between the meaning of obscenity developed in the case law and the definition of the A.L.I. Model Penal Code. . . ."

There is no indication from *Jacobellis* (*supra*) that the "balancing test" has been abandoned. That was a no clear majority decision. There was no opinion of the court.

(d) *Grove Press Inc. v. Gerstein Should Be Abandoned.*

On June 22, 1964, this Court granted certiorari in *Grove Press Inc. v. Gerstein,* 378 U.S. 577, 84 S. Ct.

[48]We believe that subsequent developments have proven the result as to "Tropic of Cancer" reached by this Court in *Grove Press, Inc. v. Gerstein* (*supra*) should be abandoned. (See Argument II(E)(d) *infra.*)

1909, 12 L. Ed. 2d 1035 and, without argument, reversed the Florida judgment which had held "Tropic of Cancer" obscene under Florida's obscenity laws. The adverse effect of that case on law enforcement on the one hand, and its encouragement to the purveyors of obscenity on the other, observed during the intervening 18 months, recommends the result there reached as a most dangerous "precedent," in so far as the morals of this country are concerned. In these troubled times, the "trade", law enforcement agencies and a substantial number of courts have interpreted the decision as meaning "Anything goes." It has proven to be an open solicitation for the publication of even greater obscenity.

No other case has given greater scandal in this nation's battle against obscenity. State and Federal Courts are proceeding without direction. See Argument ID, "A Major National Problem."

The Illinois Supreme Court interpreted the decision to require it to abandon the "balancing test" of *American Civil Liberties Union v. City of Chicago,* 3 Ill. 2d 334, 121 N.E. 2d 585 which it had previously employed in obscenity cases. They reversed the jury conviction of Lenny Bruce, but not before they noted:

> ". . . we would not have thought that constitutional guarantees necessitate the subjection of society to the gradual deterioration of its moral fabric which this type of presentation promotes. . . ."

Trial Judge Sprankle, in refusing to permit a felony indictment against a major manufacturer of lesbian type paperback books to go to a jury, said as to each of the eight books involved: "This book does not treat sex

in a more shameful manner than does Tropic of Cancer or Fanny Hill" "There is absent the customary 'obscene' words so common in 'Tropic of Cancer.' This book does not even approach 'Tropic of Cancer' in candor and description or representation of the sexual matters referred to."[49]

Another trial judge, in Kansas in July 1965 held 11 Nightstand Type books to be not obscene, with this reasoning:[50]

> "The book 'Tropic of Cancer' goes far beyond the books in question, containing virtually every filthy word in our language and portrays sexual activity in the most graphic detail. *When this book has been held by the Supreme Court of the United States to be constitutionally protected, this court cannot condemn the books named in the information as obscene."* (our emphasis).

Publishers of sub-literature similarly have interpreted the Grove Press Inc. result, as "Anything Goes," as is born out by the eruption of new pornography which followed.

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[49]See Argument ID. We submit that the trial judge's manner of reasoning, "deduction through comparison with an approved (but false) standard," when applied to the community and its reaction to undisturbed obscenity, is a real danger to this nation's moral standards. One is led to reason "what is wrong with a sex orgy, if its manifestations are everywhere about and tolerated?"

[50]*Kansas ex rel. Londesholm v. A Quantity of Copies of Obscene Books,* Titled "Sin Hooked," Bayou Sinner," "Lust Hungry," "Shame Shop," "Fleshpot," "Sinner's Seance," "Passion Priestess," "Penthouse Pagans," "Shame Market," Sin Warden," "Flesh Avenger" No. C-3595-64, unreported, Judge Tom Raum of the District Court of Sedgwick County, Kansas.

When in December 1963 this Court denied certiorari in *Zeitlin v. Arnebergh* (*supra*), affirming the decision that "Tropic of Cancer" was not obscene in California, a lone proprietor, doing business in Los Angeles as Tempo Publishing Company, brought out a new line of books. His 1964 requirements for "Boudoir Classics" were described in his form letter to prospective authors:

"Dear Mr. .....:

"With reference to your mms which we have returned, I am sending you the following letter outlining precisely our needs. Your mms was not even remotely geared to these needs, nor was it the required 40,000 words.

"We need tough, strong, hard-hitting, sex-action-filled books, geared to the demands of today's and tomorrow's market—rather than to the standards of even a few months ago.

"What we basically seek is off-beat sex, with an emphasis on deviations. Some possible themes to write by: foot wear lined and rubber clothing, ultra high heels, whipping, gagging, female dominance, gloves, sex rituals, transvestia, sadism, masochism, homosexuality, phallic symbols, buttocks, inter-racial affairs (oriental, african, indian), boots and shoes, corsets and tight lacing, spanking, tying, girls fighting, wet clothing, masks, wife swapping, lesbianism, exotic lingerie, group orgies, voyeurism, aphrodisiacs, fettishes.

"Plot is secondary. We do not want complicated plots, naive sex adventure stories 'spiced' with sex —nor pages of rambling, pointless dialogue. I need more descriptions and more character per book. Naturally, I expect the descriptions of these various things to be in good taste. The mere fact that some of these themes are used will sell our books.

"Mss for this line, if acceptable, will run up to $600, or more if necessary, with a small token payment of approximately $100, after approval and final acceptance, and the balance after publication.

"Perhaps the above will explain the unacceptability of your mms and guide your future efforts for submissions to us.

"Thank you for your interest."

The response to this form letter hit the target and produced the following titles: Lesbian Love" (B0001); "Oversexed" (B0002); "Lash of Lust" (B0003); "Lesbian Sorority" (B0004); "Lust in Leather" (B0005); "Whipped Passions" (B0006); "Perversion Resort" (B0007); "Club Unique" (B0008); "Lady Stud" (B0009); "Beyond Lust" (B0010); "Couple for Hire" (B0011); and "Sexurbia" (B0012).

Following the Grove Press reversal, other "teams" met the increased competition with other lines like "Exotik Books" which came out on the markets in late 1964, and "Satan Press" which appeared in early 1965. In a period of approximately 8 months, an esti-

mated 25,000 copies of each of the following titles appeared:

EXOTIK BOOKS

Killer Dyke (W-3)
House of Perversion (W-4)
Stud Ship (W-5)
Sex Swap (W-6)
Passion Pills (W-7)
The Rape Club (W-8)
Sex Farm (W-9)
The Gay Game (W-10)
Seed of the Beast (W-11)
Sex Fever (W-12)
Portraits of Pleasure (W-13)
Joy House (W-14)
Sexational Stepdaughter (W-15)
Love's Lash (W-16)
Motel 69 (W-17)
Strange Bondage (W-18)
Nightmare in Leather (W-19)

SATAN PRESS

Queer Daddy (101)
Passion Psycho (102)
Denied (103)
The Seeker (104)
Teacher's Pet (105)
Celluloid Sex Bomb (106)
Black Water Nympho (107)
His Brother Love (108)
Passion Sauce (109)
The Experimentors (110)
Just for Kicks (111)
Sex Challenge (112)
The Sex Trap (113)
Everybody Wins (114)
30 Day Orgy (115)
Whatever Wanda Wants (116)

The general theme of these books covered fetishism and perversion (see, Lust in Leather); sexual relations between women and dogs (see, Passion Psycho and Seed of the Beat); Incest between father, mother, brothers and sisters (Queer Daddy, Celluloid Sex Bomb, Sexational Stepdaughter and Strange Bondage) and the like.

We submit that the progeny of "Tropic of Cancer" have proved it to be a dangerous precedent from the standpoint of this nation's morals. (See Argument II D).

We believe the overwhelming majority of the people in this nation disagree with the view that holds "Tropic

of Cancer" acceptable to this nation's standards.[51] and outside the proscription of *Curl's* case (*supra*). It is a rule of law not easily understood which holds that "obscenity is suppressible but well-written obscenity is not."[52] This Court requires decency in expression from lawyers who present ideas before it. The penalty is severe:

> "40.5 Briefs must be . . . free from . . . scandalous matter. Briefs not complying with this paragraph may be disregarded and stricken by the Court."
>
> Revised Rules of the Supreme Court of the United States.

It would appear that the communities throughout this nation should have the same degree of control over ar-

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[51]"The jury . . . has a special aptitude for reflecting the view of the average person. *Kingsley Book Inc. v. Brown* (*supra*) Justice Brennan, dissenting. Of the seven juries which considered "Tropic of Cancer," not one jury cleared the book. In four criminal trials, the defendant was convicted. *People v. Fritch* (New York), *Yudkin v. Maryland* (Maryland), *People v. Cuffel* (Indiana) and *People v. Bradley Smith* (California). In the civil suit, *Grove Press Inc. v. Gerstein,* the book was found obscene. The closest the book has come to winning honors was in *People v. Pershina* (Marin County, Calif.) in which the book seller was acquitted, reportedly on failure to prove "scienter" and in which it is also reported that the jury stood 11 to 1 that the book was obscene. In *People v. McGilvery* (San Diego, Calif.), also a criminal trial, it is understood that the defendant was similarly acquitted because of failure to prove "scienter." Contrary results reached in appellate courts do not reflect jury "standards." They reflect the interpretation of what a majority of the members of those courts thought was the correct interpretation of what a majority of the members of this Court were thinking at the time the *Roth* decision was written. Such opinions are not, in the real sense, probative on the issue of "standards."

[52]*People v. The Bookcase Inc.*, 40 Misc. 2d 796, 244 N.Y.S. 2d 297, 300 (Crim. Ct. of City of New York 1963); *G. P. Putnam's Sons v. Calissi,* 86 N.J. Super. 82, 97, 205 A. 2d 913 (Dec. 7, 1964).

tists who place their ideas in the market place. We read *Curl's* case to say that government has such a right.

(e) *Roth-Standards Applied.*

The constitutional question is whether to the average person, applying contemporary community standards, the dominant theme of "Fanny Hill" taken as a whole appeals to prurient interest. The answer, unquestionably, is yes.

The test in each case is the effect of the books, considered as a whole, not upon any particular class, *but upon all those whom it is likely to reach.* The class of persons, as to whom the appellant's witnesses were testifying was a limited class—a group of literateurs. They cannot control this determination, where the book is to be offered for general sale.

This novel contains no saving factor that could overcome its obscenity. By no stretch of the imagination may it be classed as a serious work of fiction. It has no plot whatever except that which is sexual. See Appendix. The characters are introduced just long enough to accomplish their purpose, which is to show them as protagonists in a mass sex orgy.

There is no literary merit in the language. The sentence structure is archiac. The "metaphors" are nothing more than routine devices employed by professional pornographers to relieve the tedium of pornography. There is reason to believe that "engine" "machine" and the like may have had a prurient connotation 200 years ago, equal to our most salacious "modern" words. With no dictionaries to record obscenities, their "power" as word images is somewhat lessened.

The claim that "Fanny Hill" is a "moral" story is too shallow to deserve comment. Rather, it has a tendency to make a virtue of vice and a vice of virtue.

The predominant appeal of Fanny Hill is apparent. It is the "hidden look", the "voyeur" attraction, which dominates all pornography. In this regard we adopt, for sake of argument the testimony of Dr. Levin, who testified in the New Jersey trial of Fanny Hill:

"Q. Dr. Levin, have you read the book John Cleland's Memoirs of a Woman of Pleasure? A. I have.

Q. A copy of that is admitted in evidence by G. P. Putnam's Sons. A. Yes, I read that book.

Q. In your opinion, Doctor, what is the dominant subject matter of this book? A. Well, the dominant subject matter obviously is sex.

Q. How is sex treated in this book? Is it treated in a normal manner or healthy manner or wholesome manner? A. Well, that is a matter that can't be put into a single word. But I will say that the impression that I get from the book is that it treats sex from the standpoint of a voyeur. The book is full, besides giving detailed account of many acts of sexual intercourse, almost on every page, the book to a very great extent describes acts of sexual intercourse as they are seen by somebody.

Now the voyeur is a person who does not get his greatest kick out of sex unless he sees two other people having sexual intercourse in his presence. And the theme of voyeurism to my mind is the dominant theme of the book.

For example, the heroine of the book, Fanny Hill, early in her experience, before she has had sexual intercourse herself, she witnesses an act of sexual intercourse.

And then she is an inmate of a bordello, and there are four girls and four men, four girl inmates and four male guests who have a party one evening in the bordello, and each girl with her man has intercourse in the presence of all the other people. In other words there is a party that taks place in a bordello of four girls and four men. And the party consists of each couple having intercourse in the presence of the other three couples.

And then we read a few pages later that the madam of the bordello Mrs. Cole witnessed all this secretly from a peephole. It seems to me that this is emphasized to an abnormal degree throughout the book. So I would say without ever having had a chance to talk to the author of the book, I would say that he is either a voyeur or a man with strong voyeuristic tendencies.

Q. Doctor, I take this to be abnormal. A. Yes."

2. History Judgments of "Fanny Hill".

(a) *Reputation.*

In *Roth,* this Court recognized that it was "the universal judgment that obscenity should be restricted." It should be noted in this case, that it has been the universal judgment of history that "Fanny Hill" should be restrained.

This Court is now being asked to rule that the history of 215 years of suppression has been in error, and

that what has classically been regarded as a pornographic book has suddenly acquired the "social importance" which must make it available to all at every liquor store, drug store and candy store in every community in the nation. In some respects the case has the startling qualities of a demand that a neighborhood be zoned for a bawdy house.

Of interest on this score, are the observations of experts in this field, made at a time sufficiently removed from the present controversy to indicate fair reliability. The English writer, George Ryley Scott, speaking of "Fanny Hill" and John Cleland in his book "Into Whose Hands"[53] wrote the following observation in 1945, at page 145:

> "As regards the terminology employed by Cleland, there is an entire absence of profanity; there are none of the expletives and scatological terms which are so often featured in modern realistic fiction. Yet withal, the books stands out as perhaps the rankest pornography ever perpetuated by an English author having any claims to literary craftsmanship. The story is punctuated by scenes, sensually described, of the utmost salaciousness and indecency. In the first part there is the bedroom scene with the lesbian, Phoebe; there is the futile attempt at rape by Fanny's first client; there are the long erotic descriptions of her defloration by Charles, and of the seduction of her next lover's man-servant. In the second part, the various inmates of Mrs. Cole's brothel relate, with utter frankness, their life stories; there are twenty

[53]Into Whose Hands, George Ryley Scott, published by Gerald & Swan, Ltd. (1945).

pages graphically and without either delicacy or reticence depicting acts of intercourse; there is an *exposé* of Mrs. Cole's method of enabling her girls to simulate virginity; there is the notorious flagellation orgy, occupying half a dozen pages of text; there is the extraordinarily vivid description of overt homosexual vice; and finally there is the detailed account of the seduction of an idiot boy by one of the girls. One of these incidents alone would suffice to ensure the prosecution and destruction of any book published openly in England today. *The unexpurgated Fanny Hill is frankly aphrodisiacal in terminology and treatment and as such is a major contribution to pornography in its real and true sense; of this there is neither doubt nor question.*"(our emphasis).

Ernst and Schwartz, two outspoken American critics against censorship, in discussing the first case against "Fanny Hill" in the U.S. in 1821 have this to say about the book:[54]

"The volume was what is perhaps the best-selling pornographic novel of all times, . . ."

Addressing himself, to the subject of "Pornography" in the last chapter of his book "Suppressed Books,"[55] Alec Craig writes:

"The bulk of pornography is badly written, tedious, and boring; but by no means all. Men of the literary standing of Goethe and Maupassant have lent their pens to its production, and Alfred

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[54]Censorship, Morris L. Ernst and Alan V. Schwartz, published by The MacMillan Co., New York (1964) at page 15.

[55]Suppressed Books, Alec Craig, published by The World Publishing Co. 1963, at page 208.

de Musset wrote *Gamiani* to demonstrate that the French language was capable of being used to produce a book of the utmost license without employing a coarse word or inelegant expression. Indeed a great deal of pornography is quite readable taken in small doses, although the difficulties of the pornographer's task—the repeated presentation of sexual incidents which must rise to a crescendo of excitement—are all too apparent. The impossibility of avoiding monotony was once for all expressed, as we have seen, by John Cleland through the mouth of his Fanny Hill. Again, much pornography is badly printed and shabbily produced, but not all of it. Some pornographic books display great typographic and pictorial artistry on good paper in excellent binding. In fact, pornography is produced with a very wide range of literary skill and standard of book production."

(b) *Judicial Opinions.*

Appellant notes in its Jurisdictional Statement at page 3 that the basic question on appeal is whether the Massachusetts obscenity statute is unconstitutional because the highest court in that state has construed it to bar the importation, sale etc. of "Fanny Hill" in the State of Massachusetts. The appellant publisher's claim of unconstitutionality is laid to alleged rights arising out of the Fourteenth Amendment to the United States Constitution, adapted into the Federal Constitution in 1868.

It is interesting to note, as pointed out by the trial judge in his findings of facts, entered Sept. 3, 1964, that in 1821, forty seven years before the adoption of

the Fourteenth Amendment, under which appellant claims his rights in this action, the same book had been adjudicated obscene by the highest court of the same state in the case of *Commonwealth v. Holmes,* 17 Mass. 336, under the Common Law Rule which followed the *Rex v. Curl* (*supra*) precedent. Were this Court now to force the distribution of Fanny Hill upon the State of Massachusetts, against their express determination to the contrary, would be to attribute to the 14th Amendment a meaning not reasonably entertained by the states at the time they joined in the compact—certainly not the State of Massachusetts.

It would appear that Appellant is also arguing in the face of *Roth-Alberts,* for the majority opinion in that case, in support of its holding that obscenity was not protected by the First Amendment, takes note of the history of obscenity legislation in Massachusetts and in footnote 13 on page 483 cited the *Holmes* case (Fanny Hill) in support of its statement:

> "At the time of the adoption of the First Amendment, obscenity law was not as fully developed as libel law, but there is sufficient contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech and press."

While the book was held to be not obscene in New York by a 4-3 vote in *Larkin v. G. P. Putnam's Sons,* 14 N.Y. 2d 399, 252 N.Y.S. 2d 71 (July 10, 1964), the majority opinion is based largely on a comparison with Tropic of Cancer and other material and makes some unwarranted assumptions in arriving at its decision. At page 75 the Court said:

> "Dealing as it is described as doing (Grove Press v. Gerstein 84 S. Ct. 1909), with 'numerous de-

> scriptions of abnormal sex acts and indecent conversations supposed to have taken place in a Florida brothel' we would regard it as being in a class with 'Fanny Hill' and perhaps as going somewhat farther in utilization of objectionable material. If that work could not be restrained by Florida because of the interdiction of the Constitution, New York would quite obviously be left without authority to restrain 'Fanny Hill' . . ."

Judge Bergan was making a comparison with a book he *obviously* never saw. "Pleasure is My Business" does not even remotely compare with "Fanny Hill" in pruriency. Similarly at page 74, the Court said:

> "When one looks carefully at the record since 1956 of what on constitutional grounds has been allowed to be printed and circulated, and what has been suppressed, 'Fanny Hill' seems to fall within the area of permissible publications. . . ."

Once again, the judge was making deductive[56] comparisons, and as to standards that were not before him.

The most that could be said by the Court in favor of the book was, at page 74:

> "It has a *slight* literary value and it affords *some* insight into the life and manners of mid-18th Century London. It is unlikely 'Fanny Hill' can have any adverse effect on the sophisticated values of our century. Some critics, writers, and the testimony as a whole showed reasonable difference of opinion as to its value . . ." (Our emphasis).

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[56]In our view the determination of obscenity is an inductive, rather than a deductive reasoning process.

In our view the majority gave very little, if any, thought to the reasoning behind the obscenity statute. (See Argument II ....) and certainly no consideration to the "balancing concept" of prior case law.

In contrast, the dissenting opinions of Desmond and Scileppi gave full consideration to the primary interest in order and morality. At page 76, Justice Desmond commended

> "The court's reasons for reversal are as unclear as its description of the book is inadequate. 'It is an erotic book,' blandly admits the opinion, 'concerned principally with sexual experiences, largely, normal, but some abnormal,' surely a euphemistic labeling of this journal of brothel life. It seems that since some critics testify that the book has merit, it cannot be suppressed particularly since the Supreme Court has reversed State court action banning some vaguely similar books and magazines. If such reasons justify the reversal of this injunction, no such injunction can ever stand and section 22-a of our Code of Criminal Procedure disappears. . . ."

and at page 77:

> "It is today's fashion to find literary values in any sexy writing and to ridicule as blue-nosed prying Puritans and enemies of art and literature all those who try to preserve a modicum of public decency in our society. And into the law itself there has come from nowhere a new constitutional theory which licenses the most unrelieved sexual filth either on the theory of 'prevailing community standards' (Larkin v. G. I. Distrs., 14 N.Y. 2d 869, 252 N.Y.S. 2d 81, 200 N.E.2d 768 [1964]) or on a

finding of literary merit or social values (Grove Press v. Gerstein, supra). The 'literary merit' ground has slowly evolved from an exception in favor of recognized literary classics into an exception for any writing which can command the praise of a recognized critic. As to 'community standards,' who measures and discovers them? When local courts with or without juries find that a book or movie is below standard, the appellate courts reject the findings because the court 'cannot avoid making an independent constitutional judgment on the facts of the case' (*Jacobellis v. Ohio,* 84 S.Ct. 1676 [1964])."

I refuse to believe that all this can continue to be the law. I predict that the wheel will turn and the pendulum swing back. Some time and somehow we will return to the historical meaning of "Freedom of the Press." On that awaited day the courts will find it possible in at least some extreme cases not only to announce but to apply their oft-repeated holding that obscenity is an exception to the First Amendment's protection. . . ."

Justice Scileppi's dissent was more vocal in expressing lack of attention paid to the Common Law principals behind *Curl's* case and the need for a balancing, at page 78:

"The majority opinion here, in my view, sounds the death knell of the long-honored standards of American decency which have remained an integral part of our national heritage. I cannot agree that our society, even in 1964, has become so depraved that it has come to accept the kind of trash represented by 'Fanny Hill' and similar books, the

publishers and purveyors of which are now given unbridled permission to advertise obscenity for sale with complete immunity. It is difficult to believe that our forebears, in adopting the Constitution and the amendments that followed, ever intended this result. Freedom of the press is not an absolute—it *must be balanced* against the State's inherent powers to enact legislation to protect its people. The First Amendment, guaranteeing freedom of speech and of the press, was never designed or intended to protect the purveyors of filth against the more important interests of our society as a whole. In balance, public decency and morality are more important than the deprivation resulting from the banning of noxious publications which seem to appeal to that small segment of our people whose baser instincts make reading of obscenity and pornography their favorite pastime." (Our emphasis)

We submit that the minority in the *Larkin* case applied the proper concepts and that the majority misconstrued what they were required to do under this Court's past decisions.

Trial Judge Pashman's opinion in *G. P. Putnam's & Sons v. Calissi,* 86 N.J. Super. 82 found himself in disagreement with the majority of the New York Court. Out of regard for the public's interest in order and decency, he stated at page 99:

"This is not the highway to a better constitutional world; it is rather the path to decay and decline. The Constitution should not be the sword of a shameful profiteer of filth. It must be the shield to protect our sense of moral decency. . . ."

and at page 98:

> "It is our duty to prevent the circulation of such pornographic literature. . . ."

He disagreed with Justice Bergan as to that justice's deductive reasoning and, in our view, correctly held that "Because no two books are alike, each court must evaluate the book before it on its actual contents and not by comparing it to some other book." He found the book had no "social value" was "patently offensive," "prurient" and "hard core pornography."

Judge Pashman made an interesting observation, in which amicus completely agree, at page 95:

> "Those who contend that Fanny Hill is a work of literary value because it affords insight into the life and manners of mid-18th Century London must necessarily have an overwhelming sense of humor. Resort to Fanny Hill to study or authenticate the mores of these times would be the nadir of research. . . ."

It were as though the critics were tailors, the book a suit of clothes and we were living, in the fairy land of Hans Christian Anderson.

Conclusion.

The judgment below should be affirmed.

Respectfully submitted,

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APPENDIX.

Fanny Hill (by John Cleland).

Memoirs of a Woman of Pleasure. (214 pages.)

G.P. Putnam & Sons,
c1963 LC 63-9656.

CHARACTERS:

Fanny Hill . . . . 15 year old orphan
Madam Brown . . . . madam of house of prostitution
Phoebe Ayres . . . . prostitute, lesbian
Polly Philips . . . 18 years old, prostitute
Charles . . . . Fanny's first love, 19 years old
Mr. H. . . . . 40 years old, Fanny becomes his mistress
Mrs. Cole . . . . madam of a genteel house of prostitution
Emily . . . . 18 years old, prostitute
Harriet . . . . 17 years old, prostitute
Louisa . . . . 18 years old, prostitute
Mr. Norbert . . . . 30 years old, Fanny becomes his mistress
Mr. Barville . . . . 23 years old, masochist
Good natured Dick . . . . feeble-minded youth
A man of sixty . . . . Fanny becomes his mistress when she is 18 years old.

Letter the First. (pp. to 104.)

The book is in the form of two letters, addressed to an unidentified "Madam." Fanny Hill, a fifteen year old orphan girl, becomes stranded on her arrival in London from the country. She hires herself out to a woman in the belief that she is to be a servant girl. This woman, a Mrs. Brown, takes her to what is actually a house of prostitution. On the first night, Fanny is "broken in" by another inhabitant of the house, one Phoebe Ayres,

who is about thirty-five years old. Pages 14 to 16 describe detailed lesbian sex acts performed by Phoebe on Fanny as she lies naked in bed. Phoebe caresses and fondles Fanny's body, forcing an introduction of her finger into the vagina, squeezing and compressing the lips until Fanny cried out in pain. Phoebe guides Fanny's hand into the cavity of her vagina, and moving rapidly to and fro, she reaches climax.

Mrs. Brown tries to sell Fanny to Mr. Crofts, an odious, ugly, ill smelling old man. He is very wealthy. Mrs. Brown leaves Fanny alone with him, and she is terrified of him. Pages 23 to 26 describe this monstrous old man trying to rape Fanny. She breaks loose from him long enough to ring the bell for Martha, the maid. Seeing Fanny lying on the floor, nose gushing blood, and clothes half torn off, Martha advises the old man to leave.

One day, as Fanny rests on a bed in Mrs. Brown's closet, she hears the madam enter the bedroom with a young man. Pages 30 to 33 describe intercourse twice between Mrs. Brown and the young man, while Fanny watches fascinated by the scene. The young man unbuttons his trousers and produces naked, stiff, and erect that wonderful machine that Fanny had never seen. He throws himself upon Mrs. Brown's naked fat thighs, and while they are in the heat of action, Fanny becomes so sexually aroused that she resorts to a masturbation technique she has learned from Phoebe, to relieve herself. After the intercourse is over, Fanny watches facinated as the experienced matron handles the young man's penis by chafing it with her hands, bringing it to swell to the size and erection it was the first time she saw it. They have intercourse in the same manner as before.

Fanny goes to her room with such pent up emotions that she has to relieve herself by masturbating again.

Fanny confides to Phoebe her major worry—that she is physically too small to admit a "gentleman's wonderful machine." To show Fanny how this can be accomplished, Phoebe leads her to a secret place, from which they watch a session of intercourse between a girl of the house, Polly Philips, 18 years old, and an Italian boy, about 22 years old. Pages 35 to 41 describe a wild sex orgy between them, and two acts of masturbation between Phoebe and Fanny. As Fanny and Phoebe watch from the closet, Polly, naked with her thighs spread open wide, accepts entrance from the nude young Italian. After having difficulty in entering her, he withdraws and wetting his fierce erect machine (penis) with spittle, re-enters, and with ease sheathed it now up to the hilt. He thrusts in regular cadence, and then in wild fury they reach climax together. Fanny becomes so wildly excited sexually at watching this scene, that Phoebe leans her against the closet door, pulling up her skirts, and relieves her by using her hand in masturbation, performing a lesbian sex act on her. They return to watch the young couple, as Polly performs an act of fellatio on the young man, and then he lies on his back and Polly straddles him. As they reach climax in this position, Fanny can bear to watch no more, as she is so emotionally overcome. Phoebe takes her to her room, where Fanny instantly throws herself down on the bed, submitting to a lesbian act by Phoebe, but feeling no sexual satisfaction from it herself.

Several days later, Fanny sees a young man, Charles, 19 years old, in the house, and she becomes infatuated

with him. He sneaks her out of the house, and they go to an Inn. Pages 47 to 57 describe their sex orgy. As this is the first sexual intercourse Fanny has had with a man, the narrative describes in minute detail the difficulty with which this is accomplished, because she is still a virgin. Charles tells Fanny later after she had fainted from the pain, on his drawing out, when emission was over with him, her thighs were covered with blood. (p. 49) As Fanny was unable to walk, Charles orders dinner sent to the room. After dinner they have intercourse again, but Fanny is still in too much pain to enjoy it. After successive engagements "broke and inur'd" her," she began to feel enjoyment of the act. (p. 51) The next morning, Fanny awakens early and engages herself with admiring Charles, who is still fast asleep. She admires his physical beauty, and especially his sex organs. Charles awakens, and guiding Fanny's hand to his sex organs, he has her fondle him until he can stand it no longer, and takes her in intercourse. (p. 55) They have lunch in bed, and then Charles dresses and goes to town.

Charles, with the help of a lawyer friend, makes an arrangement with Mrs. Brown that enables him to take Fanny from her house of prostitution. He returns to the Inn to tell the good news to Fanny. On the second night of repeated intercourse, the pain being pretty well over, for the first time Fanny learns the transports of perfect enjoyment. (p. 59) She becomes Charle's mistress, and he sets her up in lavish quarters. She is three months pregnant when Charles' horrified family tricks him into getting on board a ship that takes him away on a long voyage.

Fanny, heartbroken, miscarries. Mrs. Jones, a procuress, who takes care of the lodging house, sells Fanny to a Mr. H. He is about 40 years old, and the brother of an Earl. Page 71 describes Mr. H. having intercourse with Fanny, who is completely devoid of feeling for him. She begs him to leave her alone that night, but he leaves saying he will return in one hour. Mrs. Jones sends Fanny something to eat that sets her on fire sexually. She wanted even little wishing for any man. (p. 74) When Mr. H. returns, she eagerly accepts him, and looses all restraint in animalistic spirit. He keeps her in constant exercise till dawn of morning in repeated intercourse. The next morning, on her first awakening, she was obliged to endure one more trial of his manhood in intercourse. (p. 76)

Mr. H. sets Fanny up in lavish style as his mistress with her own maid, Hannah. Notwithstanding the fatigues of the proceding night, they have intercourse again. Mr. H. said it was "doing honours of her new apartment. (p. 77) Fanny has been with Mr. H. seven months when she sees him having sex relations with her maid. (p. 80) Fanny gets her revenge by seducing Will, a young servant, 19 years old. His sex organs rouse her to the greatest admiration and activity of many sessions of intercourse. Pages 84 to 99 describe this affair that lasted a month. Will's sex organs are enormous, and she both fears and desires this "oversiz'd machine." (p. 85) The details of their exertions here are minute, including his exploration of her private parts. (p. 90) Naked and free to his loosest wish, his hands convulsively squeezed, opened, pressed together the lips and sides of her vagina until he becomes so sexually aroused that he takes her in an animalistic intercourse. About

one month after their first intercourse, and during one of their sex sessions, Fanny is sitting in a chair with her naked thighs wide spread, and mounted over the arm of the chair as Will stands naked in front of her attempting intercourse. Mr. H. unexpectedly enters the room. He is so angry he pays Fanny off, and orders her out of the house, sending Will home to his father.

SECOND LETTER. (pp. 105 to 214)

Fanny is befriended by a Mrs. Cole, who keeps a genteel house of prostitution staffed by exquisite and lady-like whores, Emily, Harriet, and Louisa, all in their teens. They live in luxury. Fanny hears the life story of each, in which they express their satisfaction with this life of sexual pleasures. Emily tells her story first. Page 114 describes Emily, 15 years old, in bed with a 17 year old boy. She describes the loss of her virginity. She lay utterly passive until the piercing pain made her cry out, but as the pain subsided, she was soon reconciled to fresh trials. Harriet next, tells her story. Page 118 describes the loss of her virginity at the age of 16. She is raped by a young man she does not know, but she quickly forgives him, and willingly has intercourse with him a second time. Louisa tells her story next. She tells of losing her virginity at the age of 12, to a young college boy. Pages 124 and 125 describe her masturbating. Pages 126 and 127 describe two sessions of intercourse with the young man. She was split up, torn, bleeding, and mangled but was superiourly pleased, and after the second attack, sore as everything was, pain melted into pleasure.

Mrs. Cole arranges a party for the four girls and four men. This ends in a sex orgy, the men each having in-

tercourse with the girl of his choice, while the others watch including Mrs. Cole who always watches these affairs from a secret window in her closet. Louisa is the first one led to the couch. She spreads her naked thighs to the best advantage, and her young man throws himself instantly over her. All present could observe pleasure lighten in her eyes, as he introduced his "plenipotentiary instrument" into her. (p. 131) Harriet's turn is next, and she is led to the vacant couch by her young gallant. Pages 132 to 135 describe this orgy. Harriet sits on the end of the couch. She lies back with a pillow under her head, and Louisa and Emily each hold one of her legs, and support them until they are at their widest extension. The young man, after fondling and kissing her breasts, stands between Harriet's legs, and stooped his "mighty machine" to its lure. After he had nestled it in, the girls let him support Harriet's thighs. He urges the to-and-fro confriction until she is unable to contain herself, reaching climax in wild abandon. Emily is next, and pages 136 to 138 describe her orgy. The young man has Emily bend over the couch in a standing position, with her head on a pillow. He stands behind her, fondling her breasts. He drew out his "affair" whose extreme length was most surprising. He enters her from the rear in an act of sodomy. (p. 137) When Fanny's turn arrives, her young man strips her of her clothes, and poses her in all the variety of postures imaginable. He stands facing her, and she sees his penis is one of the "true-siz'd" instruments. He enters her in a standing position, then carries her to the couch, laying her down. Primed as they were by all the moving sights of the night, they continue in a long wild drawn out intercourse. (pp. 140 to 144) After the orgy, they all have a light supper, and then retire in

pairs. There ended the night of sex orgies for Fanny in one continued strain of pleasure. The next morning, they have breakfast in bed, and her young man dresses and leaves a purse full of guineas for her. That afternoon, Fanny goes to Harriet's room to rest, when her escort of the evening before arrives. Page 145 describes him in bed with Fanny performing an act of sodomy. Fanny's young man leaves for Ireland to get married before the month is up, ending the affair with Fanny who felt deep regret at the loss of him. She is 17 years old at this time.

Fanny is approached by a Mr. Norbert, about 30 years old, while shopping. She realizes he is a gentleman of wealth by his dress. With the help of Mrs. Cole, they make him believe Fanny is a virgin, knowing he will give more money for her favors. Pages 153 to 159 describe Mr. Norbert in bed with Fanny as she feigns great pain in intercourse, and after he falls asleep, she uses a sponge soaked in red dye to simulate blood. She squeezes the red liquid between her thighs, and when Mr. Norbert awakens, and sees what he thinks is blood, he is delighted. He tells Mrs. Cole with the utmost joy and rapture, of his triumphant certainty of her virtue. (p. 159) Fanny becomes Mr. Norbert's mistress. Page 161 describes Mr. Norbert stripping her naked on a carpet, kissing her in every part, and performing cunnilingus on her. He fondles and excites her sexually, but fails to satisfy her. On the way home one evening from one of these sessions with him, she meets a young sailor, and being so sexually aroused by Mr. Norbert, within a matter of minutes she goes to a tavern with him where they have intercourse. Page 162 describes this act. The sailor bends her over the table. He bares her

naked posteriour to his "blind and furious guide," performing an act of sodomy. When Fanny returns home, Mrs. Cole warns her of the dangers of her being "so open-legg'd and free," (p. 163), particularly the risks to her health. Fanny lived with Mr. Norbert nearly a quarter of a year, when he died quite suddenly, leaving her nothing. Although she has quite a bit of money, she remains in the whore house.

Mrs. Cole tells Fanny that a Mr. Barville, 23 years old, wants to be whipped by a girl, and he in turn wants to whip her. As he will pay a large sum of money, Fanny agrees to meet him. Pages 168 to 176 describe Fanny beating him with a rod made of two or three strong twigs of birch tied together. She beats him until he is covered with blood, and he reaches climax. (p. 170) He in turn, beats Fanny as she lies naked on a bench, face down. At the first sight of blood on her buttocks, he sucked the wounds, and eased a good deal of her pain. He makes her kneel, straddling wide, facing him, and then he directs the rod to her vagina so that the sharp ends of the twigs lighted there, then in a fit of wild passion he performs an act of cunnilingus on her. (p. 172) He finishes by beating her buttocks until she nearly faints from the pain. Dinner is sent in. After dinner, the orgy begins again. Mr. Barville has Fanny strike his penis with the rod, and as if it were a magic touch, he has an erection. He strips her stark naked, and because of their bloody and beaten condition, he handles her carefully by her waist, turning her upside down with her head on a pillow on the floor, and bringing her legs around his neck, her backside exposed to him as he stands up, he proceeds to have intercourse with her. (p. 175) After this "rare adventure" is

over, Fanny was not at any time re-enticed to renew this affair with Mr. Barville.

The next man Mrs. Cole procured for Fanny, was an elderly gentleman with a peculiar fetish. He would come constantly at her toilette hours, when she had her hair hanging loose, and he would keep her an hour or more just combing, fondling, and playing with her long hair. He bought a dozen pairs of white kid gloves at a time, and would divert himself with drawing the gloves over her fingers, and then biting off the finger ends. (p. 176)

Emily tells Fanny and Mrs. Cole of going to a costume ball with Louisa, who was dressed as a shepherdess and Emily went as the shepherd. Emily is accosted by a gentleman who takes her to his room thinking she is a young boy. Pages 178 to 179 describe Emily with her breeches stript down to her knees, leaning down against the bedside, while the man performs an act of sodomy. (p. 179)

Pages 181 to 182 describe Fanny watching two homosexuals, ages 19 and 17, at an Inn where they have taken a room next to hers. She stands on a chair peering through a hole in the wall. "The criminal scene they acted, she had the patience to see to the end." (p. 182)

Pages 184 to 190 describe Fanny and Louisa seducing good-natured Dick, a feeble-minded boy, unable to speak. He is dirty and unkept. Fanny removes his clothes and the girls are astonished at the size of his sex organs. "It (penis) stood accordingly stiff and straining, ready to burst with the blood and spirits that swelled it . . ." (p. 186) Louisa then, takes hold of the youth "by that master-tool of his" and leads him to the bed. As Fanny

watches, Dick proceeds to rape Louisa. The torn, split, wounded girl cried out to Fanny to rescue her, but all was in vain to stop Dick who was full of animal passion. Finally Louisa shares the riot of his wild rapture, their active loins quivered with the violence of their conflict.

Pages 192 to 195 describe a sex orgy with two men procured by Mrs. Cole, for Emily and Fanny. They all go swimming together in the nude. As Fanny enters the water with her young man, he takes his hands and goes over every part of her, neck, breast, belly, thighs, and all the et cetera, so dear to the imagination, under the pretext of washing and rubbing them. (p. 192) He attempts to have intercourse with Fanny, as they stand waist deep in the water, but they are interrupted by the sounds of Emily, who is sitting on the lap of her young man. In this position they engage in intercourse as Fanny watches with her escort. Fanny and her young man have intercourse on a bench, while Emily and her friend watch. (p. 195)

Mrs. Cole closes her house of prostitution, and Fanny rents a house in Marybone. She is now 18 years old. She meets an elderly gentleman of sixty, refined, intellectual, and wealthy. Fanny becomes his mistress, and lives with him until he dies eight months later, leaving her a small fortune. (p. 200)

On a trip to Lancashire, Fanny stops at an Inn, and unexpectedly meets Charles, her first love. Pages 207 to 212 describe a night of sex, and repeated intercourse with him. "At its mightiest point of stiffness, it felt to me something so subduing, so active, so solid and agreeable. . . I see, I feel the delicious velvet tip!—he enters me might and main—" (p. 209)

Charles and Fanny return to London. Charles makes Fanny his wife, who "thought herself too much honour'*d* in being but his mistress." (p. 213) They bestow a legal parentage on fine children by this happiest of matches. Fanny says, "the paths of Vice are sometimes strew'd with roses, but then they are forever infamous for many a thorn, for many a cankerworm; those of Virtue are strew'd with roses purely, and those eternally unfading ones." (p. 214)

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Cases

PAGE

Alberts v. *California*, 354 U. S. 476 ..... 7, 11, 15

Chicago v. *Kimmel*, 31 Ill. 2d 202, 201 N. E. 2d 386.. 13
Commonwealth v. *Holmes*, 17 Mass. 335 3

Dominus Rex v. *Curl*, 2 Strange 788, 93 Eng. Rep. 849 ..... 2, 6, 13, 14

G. P. Putnam's Sons v. *Calissi*, 86 N. J. Super. 82, 205 A. 2d 913 5
Grove Press v. *Gerstein*, 378 U. S. 577 ..... 6, 13

Haiman v. *Morris*, Sup. Ct. of Illinois 1964. Docket No. 37276 13

Jacobellis v. *Ohio*, 378 U. S. 184 8

Kingsley International Pictures Corp. v. *Regents*, 360 U. S. 684 ..... 2, 6, 8

Manual Enterprises v. *Day*, 370 U. S. 478 8

People v. *Bruce*, N. Y. Crim. Ct. Docket No. A4406, 1964 10
People v. *Bruce*, 31 Ill. 2d 459, 202 N. E. 2d 497 13

Roth v. *U. S.*, 354 U. S. 476 ..... 7, 11, 15

Miscellaneous

Broun and Leech, *Anthony Comstock, Roundsman of the Lord* (Literary Guild of America, 1927)... 1

Craig, *Suppressed Books* (World Publishing Co., 1963) 1

Publishers' Weekly 11

Straus, *The Unspeakable Curll* (Chapman & Hall Ltd. 1927) 15

Supreme Court of the United States

OCTOBER TERM, 1965.

A Book Named "John Cleland's Memoirs of A Woman of Pleasure", G. P. Putnam's Sons (Intervenor), *Appellant*, *v.* Attorney General of the Commonwealth of Massachusetts, *Appellee.*	No. 368.

SUPPLEMENTAL BRIEF IN RESPONSE TO BRIEF AMICUS CURIAE OF CITIZENS FOR DECENT LITERATURE, INC.*

I.

The CDL brief has many inaccuracies and much that is irrelevant, but it presents, plainly and truly, the essential view of things that underlies efforts to suppress books such as *Lady Chatterley's Lover, Tropic of Cancer* and the book now before the Court. It is the view that inspired Anthony Comstock three-quarters of a century ago, the view neatly encapsulated in Comstock's famous slogan: "Morals, not Art or Literature".** The theory is that standards of con-

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* Amicus will be referred to as "CDL", and pages of the amicus brief by numbers in parentheses.

** See Craig, *Suppressed* Books (World Publishing Co., 1963) page 128; Broun and Leech, *Anthony Comstock, Roundsman of the Lord* (Literary Guild of America, 1927) *passim.*

duct—specifically, standards of sexual morality—can be preserved by forbidding certain kinds of speech and writing, that the preferred sexual morality ought to be preserved by such means, and that it is the business of government to do so.

This, of course, is a plausible political philosophy; indeed, it is a philosophy that has been adopted by other governments in times past, and at the present by governments in other parts of the world. But it is no part of our concept of government. It is explicitly rejected by the First Amendment, and, apart from the First Amendment itself, it is thoroughly inconsistent with the genius of our Constitution. *Kingsley International Pictures Corp.* v. *Regents*, 360 U. S. 684. Moreover, it is of dubious practicability; it has never been demonstrated that curbing expression increases the virtue of the citizens.

The notion that art and literature should be subjugated to this elusive goal is part of a unified and consistent theory. The theory is that the dominant political power can and should be maintained by suppressing speech and writing critical of the government; that the generally-accepted religion can and should be maintained by curbing heretical speech and writing; and that the approved sexual morality can and should be maintained by curbing speech and writing thought to be deleterious to it. This is the basis of the CDL brief. It stands squarely on the case of *Dominus Rex* v. *Curl*, which embodies this thinking, articulately and precisely.

The use of the term "sexual morality", rather than "morality", is required by the fact that the only moral standards that contemporary suppressive legislation has in view are sexual standards. Apart from some effort to deal with representations of violence, there has been no legislative attempt to suppress publication on the ground that a book might impair moral standards by the depiction, or advocacy, of cruelty, avarice, dishonesty or cowardice. The sexual virtue is the only virtue on whose

behalf we are asked to give up the right of free expression in art or literature. The statutes do not seek suppression in the interests of honesty, kindness or courage.

II.

The CDL brief contains much that, under the most tolerant standards, is not properly part of a brief. It relies, for example, on purported statements and documents that not only are outside the record, but are completely unidentified (e.g., 64, 81). It attempts to associate the appellant with other and quite different individuals and corporations, who, CDL, says, also publish the work in question.*

CDL seeks to make a point of the fact that appellant has published other books dealing with sex. Appellant's stand-

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* In listing others who have recently published *Memoirs*, CDL fails to mention New American Library, one of the country's leading publishers (*Mentor* and *Signet* books).

Memoirs has, through its history, been subjected to changes and additions that were not part of the original. In the case of *Commonwealth* v. *Holmes*, for example, the report indicates that the conviction rested, at least in part, on an illustration. CDL refers to matters that are not in the book before the Court. Thus the brief makes a reference to "incest" (68, fn. 37) although there is no incest in the book. Again, the brief quotes a comment that refers to "extraordinarily vivid description of overt homosexual vice" (89); the reference is to a description that appears in other versions of the work and that the publisher's research found not to be authentic. In the book before the Court, Fanny reports what she saw very briefly and in very indirect terms—"they were now proceeding to such lengths as soon satisfied me what they were" (Ex. A, pages 181-182). This is followed by a longer passage describing Fanny's indignant reaction to the incident and Mrs. Cole's vigorous denunciation of homosexuality.

CDL refers to "nine lesbian-type paperback books (including Fanny Hill)" (41). The description, as applied to the book before the Court, is of course incorrect. There are early lesbian incidents in *Memoirs*—early both in the book itself and in the development of Fanny's character—but Fanny soon rejects "this foolery from woman to woman" (Ex. A, page 41).

ing and reputation as a publisher was the subject of testimony at the trial, testimony curtailed by the trial court's ruling that "this action is against the book itself, not against the publisher". The testimony is nevertheless sufficient to show that appellant is an important and reputable publisher of long standing, who has been, and is, the publisher of many distinguished works (R. 82-83). Since, however, CDL has gone outside the record to mention specific books which, in CDL's view, impair appellant's character, we are constrained to submit the catalogs appended to this brief. We do not make a selection of outstanding titles, or choose a year of especial impressiveness; these are the entire current catalogs of appellant, of its wholly-owned subsidiary Coward-McCann and of its affiliated company, John Day.*

The Appendix to the CDL brief constitutes a general perversion of the work it purports to summarize. It is also inaccurate in details.** But more important than the evidence of CDL's misreading is the fact that, by omitting all the insights, reflection, portrayal of character, wit, stylistic elegance and other aspects of literary merit that *Memoirs* contains, CDL gives them emphasis. The contrast between the valueless Appendix and the book itself is further confirmation, we submit, of the values of the book.

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* Since the catalogs are published, we believe the situation appropriate for judicial notice.

** The Appendix describes Fanny's stay with Charles as "an orgy" (App. 4). Their affair is assigned as the reason for Charles's abduction (App. 4)—an event for which the book gives entirely different reasons. The reference to Charles's "horrified family" misses the point that, within the family, there is conflict between a hostile father and a doting grandmother, and that it is this conflict which leads to the abduction (Ex. A, pages 56, 65). Fanny's motivation in the incident with Barville is stated as follows: "As he will pay a large sum of money, Fanny agrees to meet him" (App. 9). The motivation as described in the book is "a sudden caprice, a gust of fancy for trying a new experiment, mix'd with the vanity of proving my personal courage to Mrs. Cole. . . ." (Ex. A, page 166).

The CDL brief also contributes to the strength of appellant's case by quoting an Alexander Pope quatrain, and contrasting Pope's philosophy with Cleland's (66). CDL thus underscores the point that, among its other values, *Memoirs* contains ideas. Pope's quatrain argues that knowledge about vice weakens character; Cleland argues that knowledge about vice strengthens character (Ex. A, page 214). Whether Pope's idea or Cleland's is the more valid is a matter of debate, but that conflicting ideas should be given full hearing is a prime concern of the First Amendment.

CDL quotes at length from testimony of a witness in the New Jersey trial involving *Memoirs*. If the excerpt from the testimony is to be considered, then, we submit, the entire testimony of that witness, and the entire transcript of that trial, should be considered (*G. P. Putnam's Sons* v. *Calissi*, Superior Court of New Jersey, Chancery Division, Bergen County, Docket No. C-3070-62, June 3 and June 4, 1964). CDL also relies on the trial judge's opinion in that case (86 N. J. Super. 82, 205 A. 2d 913). Among the many errors of fact and law in that opinion (including reliance on decisions which at the time of the opinion had been reversed or overruled) is the designation of the witness quoted by CDL as a witness for the publisher, when in fact he was a witness for the Prosecutor (86 N. J. Super. 82, 91, 205 A. 2d 913, 919).

CDL quotes writers who have referred to the book in question as "pornographic". The term "pornographic", literally, means writing about a prostitute, and in this sense *Memoirs* is obviously pornographic. In another sense, it refers to writing which is sexually arousing; as we have submitted in our main brief, the stimulation of a sexual response does not justify the suppression of art or literature. The term "hard-core pornography" has been used in judicial opinions, but "pornography" is not "hard-core pornography". The ultimate legal concept involved here is that of the "obscene", a term which, whatever its non-legal uses may be, has a specific function in the law. Under

the decisions of this Court, the word "obscene" states a conclusion on the constitutional question of whether challenged material lies within or without the protection of the First Amendment. The word "pornographic", on the other hand, denotes no legal concept, and has no constitutional significance.

Throughout its brief, CDL confuses conduct and expression (*e.g.*, 80, fn. 49; 88). These are concepts which must be kept distinct for purposes of the First Amendment. The distinction has been given emphasis by this Court. (See, for example, *Kingsley Pictures Corp.* v. *Regents*, 360 U. S. 684, 689.)

CDL urges that *Grove Press* v. *Gerstein*, 378 U. S. 577, "should be abandoned" (78). "We believe," CDL argues, "the overwhelming majority of the people in this nation disagree with the view that holds 'Tropic of Cancer' acceptable to this nation's standards and outside the proscription of *Curl's* case" (83-84). If the premises on which the brief amicus is based are accepted—that the principles of *Curl's* case are controlling and that the application of the First Amendment guaranties are a matter of majority sentiment (and if CDL's dubious assumptions about majority sentiment are granted)—then, we agree, *Grove Press* v. *Gerstein* should be abandoned. The arguments that CDL makes in the present case would, if they prevailed, require the overturning of *Grove Press* v. *Gerstein*. They would also require the overturning of the lower court decisions that in 1960 permitted the publication of *Lady Chatterley's Lover*, and in 1934 permitted the publication of *Ulysses*. Moreover, they would require the suppression of much, if not indeed the greater part, of the most honored literature produced in this country during the last several decades. The following authors and their publishers, should, if the CDL view is accepted, be imprisoned, and their books rounded up and destroyed: James Baldwin *(Another Country; Giovanni's Room);* Erskine Caldwell *(God's Little Acre);* James Gould Cozzens *(By Love Possessed);* James

T. Farrell *(Studs Lonigan);* William Faulkner *(Sanctuary);* James Jones *(From Here to Eternity);* Norman Mailer *(The Naked and The Dead; The Deer Park);* Mary McCarthy *(The Group);* John O'Hara *(Ten North Frederick);* John Updike *(Rabbit, Run);* Calder Willingham *(Eternal Fire).* The list, of course, is not exhaustive.

CDL devotes considerable space to the *dicta* of this Court, prior to *Roth* and *Alberts,* that refer to obscenity, and to the 1957 ALI tentative draft of a Model Penal Code. The former stand for no more than the proposition that anti-obscenity legislation has a permissible application, a proposition about which there is no dispute in the present case. As to the latter, its relevance is only in helping to give content to the word "prurient". The statements by the reporter for the Model Penal Code quoted by CDL (76-78) are the views of that individual, put forth prior to *Roth* and *Alberts.* They are views inconsistent with the decision in those cases and with subsequent decisions of this Court. The *Roth* and *Alberts* opinion finds the constitutional justification for anti-obscenity statutes, in the light of the prohibitions contained in the First Amendment, in the fact that only material that is utterly without redeeming social importance is affected. Beyond this such statutes may not go without contravening the guaranties. This leaves no room for the kind of balancing that the quoted statements advocate. If the work is not utterly without redeeming social importance, then, in a constitutional sense, it is simply not obscenity, however one might in some other context—artistic or moral—choose to characterize the material. A specific expression may be obscene under canons of artistic criticism, or obscene under canons of morality, but the sole issue in this Court is whether it is obscene in the sense that it is unprotected by the First Amendment.

The concept of "well-written obscenity" is, if the term "well-written" is used to denote literature of value, rather than in a very narrow grammatical or stylistic sense, a contradiction in terms. If writing has value as literature, then it cannot be said to be utterly without redeeming social importance. We beg the constitutional question when we refer to a book in issue as obscenity, before we consider whether or not it has those values that constitute social importance.

No subject matter is foreclosed to the writer, and while material is not saved from condemnation by the fact that it is "well-written" in a restricted sense, writing that constitutes creative literary product is itself socially valuable. Distinguished lyric poetry, for example, may be nothing more than "good writing". But this question is not reached in the present case. The book before the Court, as we have set forth in our main brief, has not only an artistic and creative style; it has the other merits that are associated with fiction of value, and it presents, in addition, a historical value.

CDL would leave the determination of the question of freedom of expression to juries. This is, of course, consistent with their view that such questions should be decided according to majority wishes. The right to jury trial is, of course, an important right to a defendant, and there are various issues in obscenity prosecutions as to which a jury's findings, properly arrived at, will be dispositive. But whether the publication itself is expression protected by the First Amendment is a constitutional question on which judicial determination is a matter of right in the citizen and a matter of duty for the courts. This proposition must now be regarded as firmly established.*

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* It is a necessary implication, we submit, of *Roth* and *Alberts*. See also *Jacobellis* v. *Ohio*, 378 U. S. 184, 188-189, 197, 203; *Manual Enterprises* v. *Day*, 370 U. S. 478, 488; and *Kingsley International Pictures Corp.* v. *Regents*, 360 U. S. 684, 708.

To leave the matter of whether given speech or writing is entitled to constitutional protection in the hands of jurors, on the theory that they represent a community consensus, is to make the application of the First Amendment turn on soundings of prevailing sentiment. It changes a constitutional provision designed for the protection of minority expression into a weapon for the enforcement of majority views.

CDL refers to the witnesses in the present case as "a group of literateurs", and argues that "They cannot control this determination where the book is to be offered for general sale" (85). To begin with, "they" do not "control" the outcome; the Court controls the outcome. But the testimony of qualified experts is highly pertinent. In a case like the present one—where the testimony comes from highly competent witnesses; where it is detailed, unshaken by cross-examination, confirmed by documentary evidence, and not opposed by any significant countervailing testimony—the Court should, we submit, deal with the issue as it would with any issue where the evidence is similarly substantial, credible and unopposed. CDL's proposition that such evidence is not pertinent "where the book is to be offered for general sale" would make the general population the judges of what ought or ought not to be published. We refer to the material on pages 4 and 5 of our reply brief, and ask whether the merits of *Ulysses* are visible to the general population. The point is not limited to literature. How well would the music of Schoenberg do in a popularity contest? Or, for that matter, the music of Vivaldi? Values in art and literature exist, and are important to society, regardless of whether all members of the society, or even a majority of them, are in a position to appreciate those values. Those who are qualified to explain and appraise the values in a given work of art or literature can give the Court evidence upon which to determine whether the

work has the artistic or literary value that constitutes redeeming social importance.

There is an implication here that the "literateurs" are biased, and that the persons who may testify as to the literary value of any challenged work will be biased. We respectfully refer to the material on pages 26 and 27 of our main brief, which, we submit, demonstrates the invalidity of the charge insofar as the witnesses in the present case are concerned. We point, moreover, to the fact that the published reviews in the record set forth the independent professional opinions of the eminent individuals who wrote the reviews—V. S. Pritchett, perhaps the most respected of present-day literary critics; Brigid Brophy, whose works of criticism are admired both abroad and in this country; J. Donald Adams, for many years editor of the *The New York Sunday Times Book Review;* and the prestigious, if anonymous, editors of *Time* magazine. Nor is there any reason to suppose that, apart from the present case, qualified critics will always be arrayed against the application of the statutes. In a recent obscenity trial in New York (*People* v. *Bruce,* N. Y. Crim. Ct. Docket No. A4406, 1964) there appeared, as expert witnesses for the prosecution, John Fischer, editor of *Harper's* magazine, Marya Mannes, celebrated critic and essayist, and Robert Sylvester, a prominent journalist and writer. We may expect critics and scholars of standing and recognized ability, who give detailed testimony to respect the oath that they take as witnesses. Their reputations for knowledge, perception and integrity have a practical importance, even if we were to assume that their characters are weak. It is a situation in which the promptings of self-interest coincide with the demands of simple honesty.

CDL speaks of a decision holding the book to be protected expression as one that would "force the distribution of Fanny Hill upon the State of Massachusetts" (91). The use of the word "force" is severely inappropriate. No one

is forced to read a book. Moreover, we see here again the attitude that a majority of the population should be given the power to decide what a minority is to be permitted to read. In any situation where the First Amendment protects dissident or disapproved expression, it goes against the wishes of the majority, and, in the CDL sense, "forces" the expression upon them. But there is a more serious point involved in the quoted statement—the point that states should be allowed to vary in their application of constitutional guaranties of free expression. With deep respect for the views expressed by Mr. Justice Harlan in *Roth* and *Alberts*, we submit that the approach described would, both as a matter of practicality and as a matter of principle, thwart the purposes of the First Amendent.

Publishing is a national enterprise. A book is produced and distributed by processes that take no account of state lines. The author may live in one state, the publisher operate in another, and the manufacture of the book take place in a third. Distribution is nationwide, and at the local level much of it is done through metropolitan areas that disregard state lines. New York City distributors send their books into New York, New Jersey and Connecticut; Philadelphia distributors operate in New Jersey as well as Pennsylvania. Boston distributors cover New England.* At the same time, book publishing is centered in New York, and the latitude allowed that one state in determining what is bannable would affect readers in every state.

Moreover, the economics of publishing are such that the prospect of the loss of part of the national market may well produce negative decisions on whether or not a particular book will be published. The problem is not so much with the big best seller. The problem is with the first work of a new writer, or the work of an established writer whose

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* See, for example, *Publishers' Weekly*, August 16, 1965, p. 18 and October 21, 1963, p. 24.

merit has been recognized but whose books are marginal so far as economic return is concerned. If publishers do not have constitutional principles of nation-wide application to go by—if distribution in some states is foreclosed or unpredictable—there will inevitably be a self-imposed censorship. This, of course, constitutes the most prior of prior restraints.

The interests that anti-obscenity statutes are designed to protect may be a matter of state concern, but the interests with which such statutes come into conflict—the interests that, under the Constitution, limit their application—are a matter of national concern. There will inevitably be books that suffer nation-wide suppression as a result of the absence of nation-wide protection. Moreover, if freedom of expression is to mean one thing in one state, and a different thing in another state, then it necessarily follows that decisions of this Court holding that First Amendment guaranties are incorporated in the Fourteenth Amendment must be overruled. The guaranties do not change their meaning when we pass across state lines. If the guaranties are applicable to state action, then they are applicable to the action of every state.

CDL refers to a trial judge's dismissing an indictment as to *Fanny Hill* while permitting the prosecution to go forward with respect to the other publications named (42), and to two cases in which district attorneys eliminated *Fanny Hill* from indictments while proceeding against other books (65). This is relevant to the concern that, since this Court is the ultimate guardian of First Amendment freedoms, the cases arising from the enforcement of anti-obscenity legislation may impose a heavy burden. We submit that, insofar as cases like the present one are concerned—cases in which a demonstration of literary merit or other value can be made—the burden will become progressively lighter, not heavier. The instances cited by CDL are examples of the capacity of lower courts and prosecutors to follow a course pointed out by this Court. Another ex-

ample is furnished by the actions of the Supreme Court of Illinois, which had unanimously held *Tropic of Cancer* to be obscene. After this Court's decision in *Grove Press* v. *Gerstein,* the Illinois Supreme Court withdrew its opinion and affirmed the trial court's decision holding the work entitled to constitutional protection (*Haiman* v. *Morris,* Supreme Court of Illinois, 1964, Docket No. 37276, order dated July 7, 1964). In its subsequent opinions (*Chicago* v. *Kimmel,* 31 Ill. 2d 202, 201 N. E. 2d 386 and *People* v. *Bruce,* 31 Ill. 2d 459, 202 N. E. 2d 497), the Supreme Court of Illinois applied the test of social importance to reverse convictions despite a stated distaste for the material involved.

Further confirmation by this Court of the principles which, we submit, have already been established in its earlier decisions, will have the effect of diminishing prosecutions and suppressive proceedings against publications to which they should not apply, and will thus tend to alleviate the judicial burden. A decision upon the present book and the present record in favor of freedom and against suppression can only serve to enhance clarity in the field and to diminish litigation concerning books of value.

IV.

We have referred above to the case of *Dominus Rex* v. *Curl,* 2 Strange 788, 93 Eng. Rep. 849, as the authority on which the CDL position is based. The rationale of the case is set forth in the argument of the King's Attorney General. That argument is quoted in the CDL brief (57-58), and the case itself is cited eight times. The brief attacks the principle that anti-obscenity legislation may constitutionally apply only to publications that are utterly without social importance on the ground that it is inconsistent with *Dominus Rex* v. *Curl* (75).

The case was decided in the first year of the reign of George II, the year 1727. We do not deprecate the CDL

argument because it rests on an ancient case. The date is important not because it is long past, but because it places the case in a time that is significant in relation to the First Amendment. It was a time of political and philosophical struggle. The case itself was a victory for the theory of repression. The larger contest, however, had a different outcome. By the end of the century our Constitution had explicitly rejected the ideas that prevailed in *Curl's* case.

There were two concurrent prosecutions of *Curl.* One was for the publications alleged to be obscene, and this is the case on which CDL relies. The other was a prosecution for publishing the memoirs of a government spy; here the basis of the prosecution was that the publication was seditious.* Curl was convicted in both cases. In the case that CDL cites, the King's Attorney General argued as follows:

> "What I insist upon is, that this is an offence at common law, as it tends to corrupt the morals of the King's subjects, and is against the peace of the King. Peace includes good order and government, and that peace may be broken in many instances without an actual force. 1. If it be an act against the constitution or civil Government; 2. If it be against religion; and, 3. If against morality.
>
> "1. Under the first head fall all the cases of seditious words or writings. * * *
>
> "2. It is a libel if it reflects upon religion, that great basis of civil Government and society; and it may be both a spiritual and temporal offence. * * *
>
> "3. As to morality. Destroying that is destroying the peace of the Government, for government is no more than publick order, which is morality. My Lord Chief Justice Hale used to say, Christianity is part of the law, and why not morality too? * * *"
> (2 Strange 788, 790; 93 Eng. Rep. 849, 850.)

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* Straus, *The Unspeakable Curll* (Chapman & Hall, Ltd. 1927) pages 119-120.

The argument was accepted by the court, and the motion to set aside Curl's conviction was denied.*

The fact that the King's Attorney General combined the three points in a single argument is significant. The same spirit that would stamp out sedition and heresy would repress art and literature in the supposed interests of an approved sexual morality. The three points are part of a unified pattern of government, a pattern that the First Amendment excludes. It is now well settled that "seditious words or writings", distinct from conduct, may not be suppressed, nor may heretical words or writings be suppressed. We submit that *Roth-Alberts,* considering the third aspect of restraint on expression, limits suppression of writing dealing with sex to material that is utterly lacking in literary value or any other form of social importance.

Respectfully submitted,

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* Strange reports that Curl went to the pillory, but it appears that the punishment in the obscenity case was a fine, and that his appearance in the pillory was the result of the prosecution for sedition. Straus, *op. cit. supra,* pages 119-120.

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ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS,

Appellee.

On Appeal From the Supreme Judicial Court of Massachusetts.

Motion for Special Leave to File and Supplemental Brief of Amicus Curiae Citizens for Decent Literature, Inc., an Ohio Corporation, in Reply to Appellant's Supplemental Brief.

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SUBJECT INDEX

Page

Motion for special leave to file a Supplemental Brief of Citizens for Decent Lierature, Inc., an Ohio Corporation, as Amicus Curiae, in Reply to Appellant's Supplemental Brief 1

Supplemental Brief of Amicus Curiae Citizens for Decent Literature, Inc., an Ohio Corporation, in Reply to Appellant's Supplemental Brief 5

I.

Emerging concepts like "national standards" and "independent constitutional judgment", and the possible binding effect of this Court's ruling make consideration of matters outside the record a matter of basic fairness to other state governments which were not represented in the Trial Court proceedings 5

A. To limit argument to matters in the record will work an injustice on state governments whose interests were not represented in the Trial Court, if they are to be bound by the result reached by this Court 6

B. Matters outside the record are essential for the enlightenment of those justices who adhere to an "independent constitutional judgment" type of review 8

C. Matters outside the record are essential for the enlightenment of those justices who may adhere to a "national standards" method of review 10

II. Page

The Roth test defines a balance between the rights of an individual and the rights of the community. Its application to given subject matter or conduct necessarily involves a "balancing" operation 12

III.

The rationale in Curl's case is a fundamental part of our law. The maintenance of high public morality is a proper concern of government 19

IV.

The determination of obscenity is primarily a jury question 23

V.

A state's determination presents no problem of prior restraint 25

TABLE OF AUTHORITIES CITED

Cases	Page
American Civil Liberties Union v. City of Chicago, 3 Ill. 2d 334, 121 N.E. 2d 585	17
G. P. Putnam's Sons, a corporation v. Guy W. Calissi, Bergen County Prosecutor, 86 N.J. Super. 82, 205 A. 2d 913	7
Grove Press, Inc. v. Gerstein, 378 U.S. 577, 84 S. Ct. 1909, 12 L. Ed. 2d 1035	18
Jacobellis v. Ohio, 378 U.S. 184, 84 S. Ct. 1676, 12 L. Ed. 2d 793	10, 17
Kingsley International Pictures Corporation v. Regents, 36 U.S. 684	22
People v. Bruce, 31 Ill. 2d 459, 202 N.E. 2d 497	17, 18
Rex v. Curl (1727), 2 Strange 788	19, 20, 21, 22
Roth-Alberts, 354 U.S. 476, 77 S. Ct. 1314, 1 L. Ed. 2d 1498	2, 8, 12, 14, 17, 20
Trans-Lux Distributing Corporation v. Regents, 14 N.Y. 2d 88, 248 N.Y.S. 2d 857	22
Trist v. Child, 21 Wallace 441	21
United States v. Levine, 83 F. 2d 156	13, 14
United States v. West Coast News, 228 F. Supp. 171	16
Walker v. Popenoe, 149 F. 2d 511	14

Rules	
Revised Rules of the Supreme Court of the United States, Rule 41.1	1
Revised Rules of the Supreme Court of the United States, Rule 41.2	1

Page

Revised Rules of the Supreme Court of the United States, Rule 41.3 1

Revised Rules of the Supreme Court of the United States, Rule 41.4 2

Revised Rules of the Supreme Court of the United States, Rule 41.6 4

Statutes

United States Constitution, First Amendment 8, 13, 23

United States Constitution, Ninth Amendment 3, 8, 13, 19

United States Constitution, Tenth Amendment 3, 8, 13, 19

Textbooks

American Law Institute Model Penal Code, Sec. 207.10(2) (Tentative Draft No. 6, 1957) p. 29 14

41 Chicago Bar Record (1960), pp. 416, 418 25

XL Notre Dame Lawyer, No. 1, 10 (Dec. 1964) 7, 25

XL Notre Dame Lawyer, p. 3 8

The Bill of Rights, Justice Learned Hand, Harvard University Press, p. 63 9

The Bill of Rights, Justice Learned Hand, Harvard University Press, pp. 72, 73 10

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When this Court on November 8, 1965 noted probable jurisdiction in the case herein and advanced the same for hearing with two other obscenity cases, set for oral argument on the summary calendar for the week of December 6-9, the regular schedules for filing of briefs, as provided for in Rules 41.1, 41.2 and 41.3 of the Revised Rules of the Supreme Court of the

*Citizens for Decent Literature Inc., is referred to hereinafter and in the Supplemental brief as "Amicus Curiae C.D.L".

United States, were abridged as provided for in Rule 41.4 of said rules.

On the final day of oral argument on Dec. 8, 1965, appellant's counsel herein orally requested and was granted leave of court to file a supplemental brief replying to the brief of *amicus curiae* C.D.L., which appellant had received only a few days prior to the argument. Appellant's supplemental brief was received on December 17, 1965, and for reasons stated hereinafter, *amicus curiae* C.D.L. feels it necessary to reply to the arguments made by appellant in such brief.

Amicus curiae C.D.L. has, heretofore, filed briefs in each of the three obscenity cases heard by this Court on December 7 and 8, 1965. Said briefs were in support of the People's causes, but differed from the position urged by the federal and state attorneys in their briefs.

In its briefs, *amicus curiae* C.D.L. views the test approved by this court in *Roth-Alberts,* 354 U.S. 476, 77 S. Ct. 1314, 1 L. Ed. 2d 1498 (June 24, 1957) as a definition of the balance between the constitutional rights of an individual under the first amendment, and the constitutional rights of the government under its exercise of recognized police powers. Simply stated, the balance is: Matter whose dominant theme taken as a whole presents an appeal to prurient interest, is matter which is utterly without social importance. Accordingly, such matter is subject to proscription under the police power. *Amicus* also sees in the *Roth-Alberts* majority opinion an acceptance of the "balancing" approach utilized in prior case law, represented in the A.L.I. Model Penal Code (1957

draft) and explained by the reporter's comments thereto.

Under this view, the factual determination of obscenity at the trial level, *i.e.*, whether the dominant theme of the material taken as a whole is to prurient interest, necessarily entails this same "balancing" operation, which weighs the balance between the personal right of an individual to speak with candor on sexual matters and the governmental right of the community to maintain what it regards as proper standards of public morality by proscribing pruriency. Similarly, review by this court, after a fact finding of obscenity, also entails a review of the same "balancing" to assure that the balance struck below was reasonable, *i.e.*, presented a jury question.

On the other hand, the defense attorneys view the same test as requiring the application of three separate and independent tests for prurient interest, social value, and patent offensiveness, and permitting proscription under the police powers *only* if all three tests are met. Strangely to *amicus curiae* C.D.L., the government attorneys are willing to agree, with the Attorney General of the Commonwealth of Massachusetts going so far as to say that it is possible to have material whose predominant appeal is to prurient interest which is not proscribable under the federal power or state police powers reserved to the States under the 9th and 10th Amendments. (Brief of the Attorney General of the Commonwealth of Massachusetts, p. 17.)

Amicus curiae C.D.L. viewed the failure of government (1) to pursue the "balancing" argument and (2) to address itself to the historical importance of the police power in this area, in support of the "balancing"

operation, as a weakness in the people's presentation. In our opinion, this retreat to three separate and independent tests constitutes an unwarranted abandonment of historic case law, both in the courts below and in this Court. By written motion *amicus curiae* C.D.L. requested leave to participate in argument on these matters, but the Motion was denied.

Appellant's supplemental brief attacks several aspects of the brief of *amicus curiae* C.D.L., which presented to this Court the above and other matters, not found in the government's brief. In order to answer to this court's satisfaction several questions which are presented, we therefore find it necessary to reply to appellant's arguments, and respectfully move at this time pursuant to Rule 41.6 for special leave of Court to file a supplemental brief in reply to Appellant's Supplemental brief.

Respectfully submitted,

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I.

Emerging Concepts Like "National Standards" and "Independent Constitutional Judgment", and the Possible Binding Effect of This Court's Rulings Make Consideration of Matters Outside the Record a Matter of Basic Fairness to Other State Governments Which Were Not Represented in the Trial Court Proceedings.

Appellant states, "The C.D.L. brief contains much that, under the most tolerable standards, is not proper-

ly part of a brief." (Supplemental Brief, p. 3). The objection, of course, is based upon the traditional notion that an appellate court will not go outside the trial record in considering matters on appeal. We submit, however, that undesirable as such practice may be, the People's cause is forced in that direction through the turn of events, which has recently taken place in this Court's review of obscenity cases. The inroads being made by emerging concepts, such as "national standards" and "independent constitutional judgment", and the binding effect that such Supreme Court judgments may have on the police power of other state governments which were not a party to the trial below, make any limitation on appeal to the evidence appearing in the record unfair to the People's cause.

A. To Limit Argument to Matters in the Record Will Work an Injustice on State Governments Whose Interests Were Not Represented in the Trial Court, if They Are to Be Bound by the Result Reached by This Court.

This Court's review of the Massachusetts *Fanny Hill* case is not simply the review of *a* case which affects *only* the Attorney General of the Commonwealth of Massachusetts in relation to his enforcement of the obscenity laws of Massachusetts. Appellant seeks not only to overthrow the judgments of the trial and appellate courts of Massachusetts that Fanny Hill may not be distributed within the confines of their jurisdiction, but also asks for the right to distribute Fanny Hill in all other jurisdiction (Supplemental Brief, p.

11). The result reached here may affect[1] every city and town in this nation which has, in combating the ever increasing flood of pornography, been successful thus far, either through prosecution or threat of prosecution, in keeping the book out of its candy stores, liquor stores and drug stores. The State's Attorney and the People of Illinois[2] have an interest, the Attorney General and the People of Rhode Island[3] have an interest, the County Prosecutor and People of New Jersey[4] have an interest, as do other governments whose cases have not yet reached the court room.[5]

Appellant may consider it inappropriate to argue matters which are outside the record, but *amicus* submits that the people of this nation cannot afford to rest

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[1]C.D.L. believes, however, that this Court's decision should not have such an effect. See XL, Notre Dame Lawyer, at page 10, where the author comments, "If the suggestion here advanced were adopted by the Supreme Court, it would follow that what is obscene in one State might not be in another. Why not?"

[2]*People of the State of Illinois v. Paul Romaine* (Unreported, in the Circuit Court of Cook County, Department ...., Criminal Division). Defendant held to have violated the Illinois obscenity statutes.

[3]*J. Joseph Nugent, Attorney General of the State of Rhode Island v. A Book Entitled "Fanny Hill, Memoirs of a Woman of Pleasure" by John Cleland* (Unreported, State of Rhode Island and Providence Plantations, Superior Court, M. P. No. 6467). Book held to be obscene in a temporary restraining order proceeding.

[4]*G. P. Putnam's Sons, a corporation v. Guy W. Calissi, Bergen County Prosecutor* (86 N.J. Super. 82, 205 A. 2d 913). Book held to be obscene in a trial court action.

[5]For example, we are informed by the Executive Secretary that the State Literature Commission of Georgia has instructed that an action be brought to enjoin its distribution in Georgia. In other areas, the book has been kept from distribution by threat of prosecution.

their police power upon what the Attorney General of the Commonwealth of Massachusetts, as prosecutor, is willing and able to put forward in the matter of evidence at the trial.[6]

B. Matters Outside the Record Are Essential for the Enlightenment of Those Justices Who Adhere to an "Independent Constitutional Judgment" Type of Review.

The reference materials objected to by Appellant are proper in the event individual members of this Court decide they are not bound by the "sufficient evidence" rule and instead, elect to exercise an "independent constitutional judgment" in their review.[7]

In the view of C.D.L., as expressed in its brief (Amicus Brief, p. *72 et seq.*), the review exercised by this Court, no matter what its scope may be, is one of balancing, which considers both the rights of individuals to speak, as guaranteed by the First Amendment, and the right of government to exercise its police powers so as to maintain the moral climate of the community, as reserved to the states and guaranteed by the Ninth and Tenth Amendments.[8] The *Roth* test defines the balance reached. As noted by Justice Learned Hand

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[6]In jury trials, the only evidence for the People in most instances may be the subject matter or the conduct itself.

[7]We submit, however, that an "independent constitutional judgment" is an unwarranted encroachment upon the fundamental right of a community to trial by jury, and its own determination of basic questions of fact in this area. See XL, Notre Dame Lawyer, Page 3, *et seq.*

[8]Appellant, on the other hand, does not see such a balancing. To Appellant, argument pointing up the social interest in order and morality is irrelevant, if under *any* circumstance *some slight* social value can be shown.

in "The Bill of Rights", Harvard University Press at page 63:

> "So far as appears from these decisions, it is for the legislature to determine what are the not 'impermissible limits' by *balancing* the evil of those lustful emotions that the language may excite *against* depriving the author and his audience of the benefit of what he had to say. . . ." (Our emphasis.)

It seems eminently unfair for this Court or any other reviewing court to consider some facts not within the purview of the record being reviewed, as an "independent constitutional judgment" upsetting the lower court judgment necessarily entails, and not consider in the balance other facts which are also outside the record but which are available to support the judgment.

Since the state's police power in aid of the general welfare is an interest which is entitled to constitutional protection, and a factor to be considered in this balancing process, it would appear that the judgment of any justice of this Court exercising an "independent constitutional judgment" should not be impaired by limiting his vision to such evidence as was presented before the trial court. In many instances (particularly in jury cases) the only evidence before the trial court in support of the People's case may be the subject matter or conduct itself. He should have before him the knowledge of all contemporary facts and arguments which can be marshalled to support the lower court's decision which was rendered in favor of the police power.

C. Matters Outside the Record Are Essential for the Enlightenment of Those Justices Who May Adhere to a "National Standards" Method of Review.

The essential need for informing this Court of matters outside the record[9] was recently made apparent by the principles expressed in the opinion of Justice Brennan, concurred in by Justice Goldberg, in *Jacobellis v. Ohio,* 378 U.S. 184, 84 S. Ct. 1676, 12 L. Ed. 2d 793. In our opinion the "national standards" concept of review expressed at page 1682:

> ". . . We thus reaffirm the position . . . that the constitutional status of an allegedly obscene work must be determined on the basis of a national standard. . . .
>
> ". . . The film was favorably reviewed in a number of national publications, although disparaged in others, and was rated by at least two critics of national statute among the best films of the year in which it was produced. It was shown in approximately 100 of the largest cities of the United States, including Columbus and Toledo, Ohio. We have viewed the film, in the light of the record it made in the trial court, and we conclude that it is not obscene within the standards enunciated. . . ."

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[9]Even though this Court may refuse to take judicial notice of such facts, as being outside the record, such avowals of amicus may still function as argument to raise a question in this Court's mind as to whether it possesses the qualities of a seer which seem necessary for any evaluation of "national standards." See, "The Bill of Rights" by Learned Hand, Harvard University Press, pages 72, 73.

opened Pandora's box,[10] so far as the orderly process of obscenity trials is concerned.

What is to be the fate of a case where the overburdened city, county or state prosecutor does not lay before the trial court the police actions taking place throughout the nation and the results in other obscenity trials dealing with the subject matter? Clearly such matters are relevant if the review is to follow the so-called "national standards." On a constitutional issue, is this Court to be bound by an incomplete trial record? We think not, and therefore make known to this Court through our Amicus Brief, information which, in our opinion, the dictates of justice require.

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[10]We are unable to see firm guidelines for justice in "national standards" review. How can this Court weigh in the balance a multitude of facts which it is impossible to lay before it? Justice Brennan's opinion accepted the testimony that the film was shown in "approximately 100 of the largest cities" as evidence of a standard. Does the failure to prosecute in a particular city enumerate an actual standard, or does it indict the prosecutor for failure to allow the community to express its standard? It is our opinion that this Court's decisions in prior restraint cases have broken the spirit of the prosecutors throughout the nation in this area. (Amicus Brief, page 51.) Does this make obscene material appearing on the markets today "acceptable to national standards"? Who can say that a different version of the film was not shown? It is known in the trade that different versions are exhibited at different theatres based upon the degree of law enforcement to be expected. A film "Olga's Girls" shown at the same time in Los Angeles County at two different theaters owned by the same person had two different versions. A number of objectionable scenes were cut from the version shown in county territory but remained in the version shown in city territory. The apparent reason: The county territory was within the jurisdiction of the District Attorney who had indicated a complete willingness to take such matters to court. In another instance a motion picture film "Olga's House of Shame" and its director were indicted in Oregon. At the extradition hearing in New York, the director argued to the judge that he should not be extradicted because the film had been licensed in New York. It was necessary for an aggressive Portland District Attorney to bring the indicated film to New York to show that the Portland exhibition had 18 scenes which did not appear in the version which was licensed by New York.

II.

The Roth Test Defines a Balance Between the Rights of an Individual and the Rights of the Community. Its Application to Given Subject Matter or Conduct Necessarily Involves a "Balancing" Operation.

Appellant takes issue (Supplemental Brief, p. 7) with the "balancing" concept expressed by the reporter's comment in the A.L.I. Model Penal Code (1957 Draft) and makes the following statements in argument:

> ". . . The Roth and Alberts opinion finds the constitutional justification for anti-obscenity statutes, in the light of the prohibitions contained in the First Amendment, in the fact that only material that is utterly without *redeeming* social importance is affected. Beyond this such statutes may not go without contravening the guaranties. *This leaves no room for the kind of balancing that the quoted statements advocate. . . .*"

To *amicus curiae* C.D.L., the above language itself appears self-defeating to Appellant's cause. We cannot see how one can fail to expect a *balancing* process of some sort, when one considers, as Appellant is willing to acknowledge, that under the *Roth* decision, the spotlight is cast upon the "redeeming"[11] quality of the social importance. The word "redeem", by its nature suggests a balancing operation. As applied to qualities

[11]"Slight" social importance is not enough here. To escape suppression, it must be ' redeeming" social importance.

and actions, the verb "redeem" is defined in Oxford Universal Dictionary by Rand McNally and Company as:

> "10. Of qualities, action, etc.: To make up for, compensate for, *counterbalance* (some defect or fault) . . .b. To save (a person or a thing) from some defect or blot." (Our emphasis.)

How can one establish the point of "counterbalance" unless one does match the compensating quality (social importance—First Amendment) against the negative defects (pruriency—Ninth and Tenth Amendments)?

Appellant continues (Supplemental Brief, p. 7) that the "balancing" concept which is explained in the reporter's comments to the A.L.I. Model Penal Code (1957 draft) and cited by Amicus Curiae C.D.L. (Amicus Brief, pp. 76-78) are the "views of that individual, put forth prior to Roth and Alberts," and "are views inconsistent with the decision in those cases (Roth and Alberts). . . ." But this simply is not a correct statement of the law as it appears! Certainly there is no case holding to that effect, and we read the Roth-Alberts decision to indicate a contrary position. The position of *amicus curiae* C.D.L. (Amicus Brief, p. 75) is that the 1957 draft and the reporter's comments thereon are a codification of prior case law which this Court has not departed from.[12] One statement of the balancing rule was expressed by Justice Learned Hand in *United States v. Levine*, 83 F. 2d 156, 158, as:

> "The standard must be the likelihood that the work will so much arouse the salacity of the reader

[12]In this regard, Appellant does not attempt to reconcile the view of prior case law with his interpretation of Roth-Alberts.

> to whom it is sent *as to outweigh* any literary, scientific, or other merits it may have in that reader's hands; of this the jury is the arbiter. . . ." (Our emphasis.)

Similarly, in *Walker v. Popenoe,* 149 F. 2d 511, 512, the Court of Appeals considered the same balancing test, in ruling certain matter not to be within the range of a jury question. The *Popenoe* court held that a finding of obscenity by a jury *under the balancing test expressed in Levine* could not be supported, and dismissed the charge. As the A.L.I. reporter explains in his comments at page 29 *et seq.,* both the question of law for the court (if there be one) and the question of fact for the jury (if there be one) involves this "balancing" test.

There is no indication, as claimed by Appellant, that this Court in *Roth-Alberts* meant to depart from the "balancing" rule expressed in prior case law.[13] On the contrary this Court in *Roth-Alberts* cited with approval the very statement of the reporter relied on by Amicus Curiae C.D.L. (Amicus Brief, p. 76 *et seq.*). See *Roth-Alberts* at page 487, fn. 20, where this Court noted:

> "We perceive no significant difference between the meaning of obscenity involved in the case law and the definition of the American Law Institute Model Penal Code, Section 207.10 (2) (Tentative Draft No. 6, 1957). . . . *See . . . the discussion at page 29 et seq. . . .*" (Our emphasis.)

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[13]Both Levine and Popenoe were cited with approval in *Roth* at page 489, fn. 26.

The reporter's discussion at page 30 read in part:

> "Policy as well as constitutional limitations enjoin us to safeguard freedom of expression by *balancing* artistic or other merits of a work against the alleged prurient appeal. . . ." (Our emphasis.)

Our brief does not go so far as to say that testimony by "literateurs" is not pertinent, as claimed by Appellant (Supplemental Brief, p. 9). Our position is that such testimony is relevant, but because of the "balancing" concept, it is not controlling. Appellant of course has a different view, since it does not believe in the balancing concept. The testimony referred to was limited to opinion testimony on whether the book had merit. Those witnesses offered no testimony, whatsoever on the "effect of the book, considered as a whole upon all those whom it is likely to reach", and their testimony, such as it was, could only be weighed in the balance.

Because our brief (Amicus Brief, p. 85) assesses Fanny Hill in a different manner than that urged by Appellant's experts, Appellant broadly assumes (Supplemental Brief, p. 10) that "There is an implication here that the 'literateurs' are biased", also "that the person who may testify as to the literary value of any challenged work will be biased." The former assumption is incorrect. We are sure, as did happen in this case in the testimony of John E. Collins, that there are "literateurs" who will testify to exactly the opposite of the Appellant's witnesses in this case. The latter assumption, as applied to the facts of this case, we are less reluctant to disagree with. Our experience has shown that there are those who will testify in a manner which is necessarily biased because of personal philosophical inclina-

tions. There is many a writer, critic and reviewer today who entertains no regard for the obscenity laws of this nation, and to whom, it might justly be commented, nothing is obscene. District Judge Fox had occasion to comment on this recently in a case involving the paperback book "Sex Life of a Cop" in *United States v. West Coast News,* 228 F. Supp. 171 (Mar. 25, 1964) at page 189. He concluded by saying at page 190:

> "In this case, by giving defendants more protection than they were entitled to under the law, the jury heard *advocates* and not *experts.* These advocates attempt to make straight the way for the free flow of obscenity.
>
> "Witness Kirsch was an advocate of his special interests as an editor of the books section for the Los Angeles Times. . . . His opinion was clearly influenced by his personal, academic, economic and philosophical interests. . . ."

James Jackson Kilpatrick, editor of the Richmond News Leader, had similar comments to make in his book, "The Smut Peddlers" at page 39, regarding the testimony of the same Los Angeles book editor in a California trial involving the same publication and the paperbook book "Rambling Maids".

Appellant, in addressing itself to this Court's concern over the heavy burden occasioned by the increasing number of obscenity cases appearing on the dockets suggests that the burden may be lessened if this Court applies an independent test of "social value" (Supplemental Brief, pp. 12-13), and rejects the balancing concept. The brief refers to cases mentioned in C.D.L.'s Amicus Brief at pages 41 *et seq.* under the heading "A Major National Problem" and states: "The instances

cited by C.D.L. are examples of the capacity of lower courts and prosecutors *to follow a course pointed out by this Court.*" (Our emphasis.) This, of course, brings the opposing contentions into focus. Appellant says the lower courts are following this Court's direction; we say that the lower courts are misinterpreting this Court's direction. Appellant cites the decision of the Supreme Court of Illinois in *People v. Bruce,* 31 Ill. 2d 459, 202 N.E. 2d 497, reversing a jury verdict and its own prior judgment finding Lenny Bruce guilty under the Illinois obscenity laws, as an example of a state court's ability to "follow a course pointed out by this Court." It is true that the Illinois Supreme Court in *People v. Bruce* (*supra*), wrote an opinion upholding contentions similar to those of the Appellant. In that case, the majority opinion (Justice Schaefer concurred in the result) noted that it had, in an early opinion in the same case, rejected the defendant's arguments that the *Roth* case, struck down the "balancing test" which was ruling case law in *American Civil Liberties Union v. City of Chicago,* 3 Ill. 2d 334, 121 N.E. 2d 585. The *Civil Liberties* case held at page 498 that:

> "The obscene portions of the material must be balancing against its affirmative values to determine which predominates. . . ."

Someone apparently failed to point out to the Illinois Supreme Court that the *Civil Liberties* case had been cited with approval by this Court in *Roth* at footnote 26. Following the *Jacobellis* decision, the Illinois Supreme Court reversed its previous ruling, giving as its *sole* reason, at page 498:

> "It is apparent from the opinions of a majority of the court in Jacobellis that the 'balancing test'

> rule of American Civil Liberties Union is no longer a constitutional acceptable method of determining whether material is obscene, and it is there made clear that material having *any* social importance is constitutionally protected."

The Illinois Supreme Court was led into accepting a rule of law it would not otherwise have adopted, at page 498:

> ". . . we would not have thought that constitutional guarantees necessitate the subjection of society to the gradual deterioration of its moral fabric which this type of presentation promotes. . . ."

Mr. Lenny Bruce, however, did not fare as well with his arguments in the New York Courts in *People v. Bruce,* New York Criminal Court Docket No. A4406, 1964. In that criminal action in New York City he was found guilty of using obscene words in his night club act. On a petition for certiorari, this Court refused to consider his case during the October Term 1964. It is our view that the Illinois Supreme Court was led into error by the result reached in *Grove Press, Inc. v. Gerstein,* 378 U.S. 577, 84 S. Ct. 1909, 12 L. Ed. 2d 1035, and the Jacobellis "no clear majority" decision, and had it understood that this Court was going to deny certiorari in the New York conviction of Lenny Bruce, it would not have reversed the Illinois jury conviction and its own judgment to the contrary in the Illinois *Bruce* case.

To Appellant, "The Appendix to the C.D.L. brief constitutes a general perversion of the work it purports to summarize" (Supplemental Brief, p. 4). We ad-

mit that no attempt was made to couch the language in Old English, and in this respect perhaps the summary might be looked upon by an "unsympathetic literateur" as a "perversion". We do believe, however, that it succeeds without difficulty in pointing out that the dominant theme of the material taken as a whole is an appeal to prurient interest. Under our theory of a "balancing" test this is important—Appellant thinks otherwise.

III.

The Rationale in Curl's Case Is a Fundamental Part of Our Law. The Maintenance of High Public Morality Is a Proper Concern of Government.

Appellant's unwillingness to accept the "balancing" concept is the natural consequence of Appellant's refusal to give recognition to a *second and equally important constitutional right* which is involved here—the police power of state government, as guaranteed by the Ninth and Tenth Amendments, first enunciated in the English Common Law with respect to sexual morality (obscenity) in *Rex v. Curl* (1727) 2 Strange 788. Appellant argues: "By the end of the century our Constitution had explicitly rejected the ideas that prevailed in Curl's case." (Supplemental Brief, p. 14) and ". . . it is no part of our concept of government" (Supplemental Brief, p. 2), and finds fault (Supplemental Brief, p. 2) with the theory "that standards of conduct—specifically, standards of sexual morality—can be preserved by forbidding certain kinds of speech and writing, that the preferred sexual morality ought to be preserved by such means, and that it is the business of government to do so. . . ."

We were of the opinion that *Roth-Alberts* had answered both of Appellant's arguments to the contrary.[14]

In support of its argument that the ideas that prevailed in *Curl's* case had been rejected, Appellant quotes (Supplemental Brief, p. 14) at length the argument of the King's Attorney General which appears in *Curl's* case, but omits from the Attorney General's quotation the very portion which explains the rationale and establishes the rule of *Curl's* case, namely:[15]

> "I do not insist that every immoral act is indictable, such as telling a lie, or the like; but if it is destructive of morality in general, if it does, or may, affect all the King's subjects, it then is an offense of a public nature. And upon this distinction it is, that particular acts of fornication are not punishable in the Temporal Courts, and bawdy-houses are. In Sir Charles Sedley's case it was said, that this Court is the custos mores of the King's subjects. 1 Sid. 168."

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[14]At page 482:

> "The guarantees of freedom of expression in effect in ten of the fourteen States which by 1792 had ratified the Constitution, gave no absolute protection for every utterance. Thirteen of the 14 States provided for the prosecution of libel, and all of those States made either blasphemy or profanity, or both, statutory crimes. As early as 1712, Massachusetts made it criminal to punish 'any filthy, obscene, or profane song, pamphlet, libel or mock sermon,' in imitation or mimicking of religious services. Acts and Laws of the Province of Massachusetts Bay, Chapter CV, Section 8 (1712), Massachusetts Bay Colony Charters and Laws, 399 (1814). Thus, profanity and obscenity were related offenses. . . ."

[15]Compare C.D.L.'s citation of the Attorney General's quotation on morality (Amicus Brief, p. 57, fn. 23) with the same quotation, cited by Appellant (Supplemental Brief, p. 14). The three asterisks appearing on the latter page indicate the position where the portion noted above, and omitted by Appellant, should appear.

In failing to address its reply to that portion of the argument of the King's Attorney General which explained the rationale of the police power, Appellant has said nothing which disturbs the merits of *Curl's* case. What the King's Attorney General said in 1727, is equally true today. Contrary to Appellant's contentions, Curl's rationale is one of the cornerstones of our constitutional government. While private acts of fornication may be treated by government as a matter of private morals, a house or trade dealing in fornication is universally treated by government as a matter of public morals and a proper subject for criminal laws. While our man-made law does not prohibit every moral evil, it does nevertheless, contrary to the position taken by Appellant in its Supplemental Brief, address itself to the purpose of maintaining high *public* morality.[16]

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[16]In 1874 Justice Swayne, speaking for a unanimous United States Supreme Court in *Trist v. Child*, 21 Wallace 441, 450 (1874), said:

> "The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is undermined, the structure is weakened. When it is destroyed, the fabric must fall. Such is the voice of history. . . ."

Concerning the power of government to regulate matters relating to *public morals* and power to say what is offensive to *public morality*, the United States Supreme Court said, in 1887:

> ". . . The power to determine such questions (what is offensive to public morality) so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of many, provided only they are permitted to do as they please. Under our system, *that power is lodged in the legislative branch of the government*. It belongs to that department to exert what are known as police powers of the state, *and to determine primarily, what measures are appropriate or needful for the protection of the public morals*, the public health, or the public safety. . . ." (Our emphasis.)

C.D.L. views with a great deal of sadness the fact that the members of this High Court, with few exception, have failed in

In the opinion of *amicus,* there is no question as to the validity of Curl's rationale regarding the role of government in maintaining the public morals.

Appellant argues (Supplemental Brief, p. 2) regarding the Curl's rationale, "It is explicitly rejected by the First Amendment and, apart from the First Amendment itself, it is thoroughly inconsistent with the genius of our Constitution. (*Kingsley International Pictures Corporation v. Regents,* 360 U.S. 684.)" We do not understand this as being a proper statement of the law. (See *Amicus* Brief, p. 66, *et seq.* and our comments on the *Kingsley* case at p. 68, fn. 37).

Appellant, in further argument against the *Curl* case rationale (Supplemental Brief, p. 2) takes issue with "The notion that art and literature should be subjugated to this elusive goal . . ." We have said something on this score in another regard (Amicus Brief, p. 84). A more judicial reply however is found in the majority opinion of Justice Burke of the Court of Appeal of New York in *Trans-Lux Distributing Corporation v. Regents,* 14 N.Y. 2d 88, 248 N.Y.S. 2d 857-863:

> "To all argument predicated on artistic merit as decisive of the constitutional question, it is sufficient answer to say that artists are not such favorites of the law that they may ply their craft in the teeth of a declared overriding policy against

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their opinions to speak with nobility on this paramount right of government to speak through the jury system on matters relating to sexual morality. It is our opinion that, as in time of Curl, it would take but one small direction from this Court to start the trend in community morals swinging in the opposite direction (the direction of public decency). See also Amicus Brief, p. 69, fn. 39. In this regard, we feel this Court is lagging the needs of its people.

pornographic displays. Since no other profession is privileged to bend public morals, policy and law to its internal craft standards, then neither should producers of films. . . ."

IV.

The Determination of Obscenity Is Primarily a Jury Question.

Appellant deprecates (Supplemental Brief, pp. 8, 9) C.D.L.'s view that the determination of the question of freedom of expression in the sexual area is largely a jury question. It has no difficulty however at the same time in viewing "The right to jury trial" as "an important right to a defendant." Says Appellant "To leave the matter of whether given speech or writing is entitled to constitutional protection in the hands of jurors, on the theory that they represent a community consensus, is to make the application of the First Amendment turn on soundings of prevailing sentiment. It changes a constitutional provision designed for the protection of minority expression into a weapon for the enforcement of majority views." But why shouldn't the People also have the right to a jury trial on issues which relate to the police powers of government, and which will affect community moral standards.[17] In History of the English Law, by Pollack and Maitland, the authors identify the jury with the community:

> "The verdict of the jurors is not just the verdict of twelve men; it is the verdict of a pays, a 'country', a neighborhood, a community . . . The voice of the twelve men is deemed to be the voice of the countryside, often the voice of some hundred

[17]See Amicus Brief, pages 74, 75 and fottnotes 43, 44.

> or other districts which is more than a district, which is a community. The royal justices seem to feel that if they analyze the verdict, they would miss the very thing for which they are looking, the opinion of the country. . . ."

The people of the American Colonies claimed the right of trial by jury as their most prized possession as Englishmen. Its deprivation in many cases was listed in the Declaration of Independence as one of the grievances against the Crown. At Common Law and under the early American decision, it was universally held that the accused in a criminal prosecution could not waive jury trial in any case. The question is often asked in obscenity cases, "Who are the experts on 'pruriency'." The answer is, and should be—the community, speaking through the jury, acting as an "ad hoc" legislative body.

Appellant puts forth the view (Supplemental Brief, p. 5) that the author Cleland in Fanny Hill "argues that knowledge about vice strengthens character"[18] and that "Whether Pope's idea or Cleland's is the more valid is a matter of debate, but that conflicting ideas should be given full hearing is a prime concern of the First Amendment. . . ." We submit however that Appellant as the publisher of Fanny Hill wants nothing like the "full hearing" he is entitled to under our system of law.[19] The obscenity laws of Massachusetts provided

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[18]Appellant's authority for this proposition is the last page of the 214 page text. We calculate this ingredient to constitute considerably less than 1% by volume.

[19]"Defendant invariably recoils in horror at any suggestion that the question of obscenity be submitted to a jury. This leads one to question his sincerity for there is no better way of determining community standards of morality than the time-tested

Appellant with the most ideal forum in which to present his conflicting ideals for a full hearing—a jury of representative members of the community. This right was waived at the outset.

V.

A State's Determination Presents No Problem of Prior Restraint.

Appellant, replying to C.D.L.'s arguments that the distribution of Fanny Hill should not be forced upon a state against that state's contrary determination under its exercise of the police power of that state (Supplemental Brief, pp. 11, 12) paints a colorful picture of economic confusion which is supposed to result if a state is to be permitted to make its own determination: "The author may live in one state, the publisher operate in another, and the manufacturer of the book take place in a third". The distributor outlets cover many states. The pubisher, distributors etc. must have a business guarantee, says Appellant, else it will not publish, distribute etc.[20] Next, Appellant argues the oft re-

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method of trial by jury. . . ." Bromberg, Five Tests for Obscenity, 41 Chicago Bar Record 416, 418 (1960).

"Are they not telling the justices that they believe they can prevail only if the community standard is *not* applied? The Court hasn't gotten the message. . . ." XL Notre Dame Lawyer, No. 1, 10 (December 1964).

[20]Appellant's arguments do however demonstrate why state controls are not enough and why the federal police power is an indispensable necessity to the control of obscenity. The federal powers of nationwide investigations, subpoena and extradition are needed. How can the state powers effectively meet the problem when the police power cannot reach the parties involved in the transaction—cannot strike at the really culpable source of manufacture, which is without. It is a recognized fact that publishers locate themselves in the liberal jurisdictions and take sanctuary in the relatively low risk of state prosecution. State prosecution without their jurisdiction gives them little worry. The state ac-

peated cliche. "This, of course, constitutes the most prior of prior restraints." As a practical matter, how difficult is it to get a paperback published and distributed today? The fact is, there is no difficulty, and the opposite is true. The volume of obscene paperbacks on the market today indicates there are no end of people who will act as publishers and manufacturers and distributors. These publishers and distributors require no guarantee—they operate on credit and their ability to "beat the law". We submit that an affirmation of the state court judgment will have the overall effect of nullifying the "anything goes" attitude which exists in certain segments of the industry, which in turn will restore an attitude of responsibility which the obscenity laws require of all publishers. We are sure that this nation will have much to gain if Appellant will but continue to devote its energies to the type of publications represented by the catalogs which appear in the Appendix to Appellant's Supplemental Brief, and will retreat from its attempt to prove that the rights of a publisher *under all circumstances* are paramount to the police right of community government.

Respectfully submitted,

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JAMES J. CLANCY,
RAY T. DREHRER,
Counsel for Amicus Curiae.

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tion has heretofore been largely against the retailer. In most states the obscenity crime is a misdemeanor and extradition for a misdemeanor, generally is not practicable. C.D.L. is in the hopes that Justice Harlan recognizes this national dilemma and will retreat from his view that the federal police powers and federal juries are not equally involved.

Supreme Court of the United States

OCTOBER TERM, 1965.

A BOOK NAMED "JOHN CLELAND'S MEMOIRS OF A WOMAN OF PLEASURE", G. P. PUTNAM'S SONS (INTERVENOR), *Appellant*, *v.* ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, *Appellee.*	No. 368.

APPELLANT'S OBJECTION TO MOTION OF AMICUS CURIAE TO FILE A SUPPLEMENTAL BRIEF

Appellant opposes the filing of a second amicus brief by Citizens for Decent Literature, Inc. (hereinafter "CDL"). Even if CDL were a party, this second brief would be inappropriate. Rule 40 embodies the established procedure of opening brief, response, and reply. CDL's first amicus brief, a 108-page document, was addressed specifically to appellant's jurisdictional statement, which contained the substance of the arguments made in appellant's main brief. Since the amicus brief was filed too late for appellant to respond prior to the oral argument, appellant sought leave to file a supplemental brief after argument in reply to CDL, and leave was granted. Appellant's supplemental brief was served and filed on December 16, 1965, in accordance with the Chief Justice's direction that it be filed promptly (the argument having been concluded on December 8). More than two weeks later, amicus seeks leave to file a second brief.

Rule 41(5) specifies the occasions for filing a supplemental brief, and none of them are present here. Rule 41(6) permits the receipt of a brief after argument upon special leave, but special leave implies special circumstances, which do not exist here. Those Rules, of course, apply to parties. Rule 42 shows that the function to be performed by an amicus, relative to that of a party, is a restricted one.

The proposed second brief contains no points going to the merits that have not already been urged. It seeks to justify the inclusion in the first CDL brief of matter that was neither part of the record nor the subject of judicial notice—matter in some instances not even identified by source. The filing of a second amicus brief for such a purpose is not warranted. Apart from this effort, the proposed second brief does no more than expound points already urged in the first CDL brief. In repeating these points, however, the second brief intrudes serious distortions and inaccuracies, to which response ought to be made if the proposed second brief is to be accepted. Included among them are the following:

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CDL, without any justification for it, attempts to take on the mantle of spokesman for all states other than Massachusetts (6-7). At the same time CDL suggests that our basic judicial process of determining issues as they are presented by parties to a litigation be abandoned (7-8). What process CDL would substitute is not clear. It is clear, however, that CDL does not speak for the various states which it assumes to represent. The law enforcement officials of those states are of course able to speak for themselves, and, when they think it appropriate, they of

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* The items that follow are arranged under the numerical headings of CDL's proposed second brief. Numbers in parentheses refer to pages of that brief.

course know how to make their views known. (*Cf. Gideon* v. *Wainwright*, 372 U. S. 335.) CDL makes specific reference to Illinois and New Jersey. The Supreme Courts of Illinois and New Jersey have dealt with the matter of anti-obscenity legislation and the effect of *Roth* and *Alberts*, and surely the law enforcement officials of those states are not unfamiliar with the issues. The Prosecutor of Bergen County, who conducted the case involving *Memoirs* in New Jersey, has been aware of the progress of the present case; the appeal in New Jersey was postponed pending the disposition of the present appeal.

CDL itself stresses the contrast between its own views and those of the Solicitor General in No. 42 and of the New York County District Attorney in No. 49, as well as with those of the Massachusetts Attorney General in the present case. We submit that these public officials speak for their respective governments with greater warrant than does the private organization that submits these amicus briefs, and with greater appreciation of the constitutional issues involved.

In its brief previously submitted, CDL referred to matters which were not only outside the record, but which could in no event be deemed proper subjects for judicial notice. It now offers three asserted justifications for this. One is in the material commented on above. Another depends on a bizarre misreading of the phrase "independent constitutional judgment". CDL would have it mean, apparently, that the judgment referred to is to be independent of the record; the proposed brief states that an independent constitutional judgment "necessarily entails" facts outside the record (9). The third is allegedly found in the language of Mr. Justice Brennan in *Jacobellis* (10). But there is nothing in that language suggesting that consideration be given to matters that lie both outside the record and outside the scope of judicial review. Indeed, what is referred to in the portion of the opinion quoted by CDL was part of record in that case (Transcript of Record in *Jacobellis*, pages 361, 488-495, 497).

II

CDL argues that the word "redeeming" in the *Roth-Alberts* phrase "utterly without redeeming social importance" requires a balancing of the quantum of social importance against the quantum of appeal to prurient interest (12-13).* The context in which the phrase appears, and the use of the word "utterly", emphatically negate the balancing that CDL is advocating, a balancing that was employed in some cases prior to the time when this C[illegible] made it clear that the operation of anti-obscenity legislation presents constitutional issues.

The sense of the word "redeeming" as used in *Roth-Alberts* is this: social importance redeems from suppression material which, but for the presence of social importance, might come within the scope of anti-obscenity legislation. The plain meaning of the statement in *Roth-Alberts* (repeated in the opinion of Mr. Justice Brennan in *Jacobellis*) is that the presence of social importance invokes the protection of the First Amendment, and thus overrides considerations that would argue for suppression in the case of material utterly lacking that importance.**

If there had been any doubt about whether this is the meaning of the *Roth-Alberts* statement, the doubt could not

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* It may be noted that the italics which CDL uses in quoting appellant's supplemental brief (12) are not in the original. Moreover, contrary to the CDL statement that follows the quotation, there has been no acknowledgment by appellant that "the spotlight is cast upon" the word "redeeming". We do not "spotlight" that word, nor do we ignore it. Its function in the *Roth-Alberts* statement is as described in what follows.

** Appellant does not, of course, rest on the social importance test alone. As set forth in our main brief and our reply to appellee, we urge that *Memoirs* does not have the morbid and unhealthy elements that constitute prurient interest, or the grossly repellent patent characteristics that constitute patent offensiveness.

survive the expatiation of the statement in *Jacobellis* by the Justice who was its author in *Roth. (City of Chicago* v. *Kimmel,* 31 Ill. 2d 202, 201 N. E. 2d 386; *People* v. *Bruce,* 31 Ill. 2d 459, 202 N. E. 2d 497; *Larkin* v. *G. P. Putnam's Sons,* 14 N. Y. 2d 399, 200 N. E. 2d 760; for earlier views, see *Zeitlin* v. *Arnebergh,* 59 Cal. 2d 901, 920, 383 P. 2d 152, 165; *State* v. *Hudson County News Co.,* 41 N. J. 247, 265, 196 A. 2d 225, 235.)

CDL refers to *United States* v. *West Coast News,* 228 F. Supp. 171 (W. D. Mich.), in support of its argument that witnesses testifying as to literary merit are necessarily biased (15-16). That case serves only to underscore the difference between matters which are properly the subject of testimony in cases such as this and matters which are not. The *West Coast News* opinion shows that the witnesses there, testifying on contemporary community standards, went on to express their views on obscenity laws generally. In the present case, by way of contrast, the witnesses called by the appellant testified only on a subject as to which they were qualified as experts—the matter of whether *Memoirs* has literary value or historical significance. They did not testify as to matters of law, or on other subjects as to which their opinions would not constitute evidence. (The one witness for the appellee, however, was permitted, over objection, to state conclusions of law.) The kind of testimony referred to in the *West Coast News* case emphasizes the reliability of testimony such as has been given in the present case, testimony within the professional competence of witnesses whose professional reputation is involved, and who are called upon to give a detailed appraisal of a particular work and not their general views on whether something is obscene or on what the law ought to be.

Under this same heading, CDL states that this Court denied certiorari "in the New York conviction of Lenny Bruce" (18). In fact, the case in which certiorari was denied (*Bruce* v. *Hogan,* 381 U. S. 946) was one in which Bruce sought a federal court injunction against state court

prosecution. The question of obscenity in the Bruce performance was not decided in the federal action; that question is still pending in the New York appellate courts.

III

In returning to its reliance on *Rex* v. *Curl,* CDL makes unusual use of other opinions. CDL quotes the opinion of Judge Burke in *Trans-Lux Distributing Corp.* v. *Regents,* 14 N. Y. 2d 88, 198 N. E. 2d 242, without mentioning the fact that the Court of Appeals was reversed by this Court *per curiam* (380 U. S. 259), and without taking note of the fact that Judge Burke's views on artistic merit no longer represent the majority view of the New York Court of Appeals (*Larkin* v. *G. P. Putnam's Sons,* 14 N. Y. 2d 299, 200 N. E. 2d 760 (22-23)). In footnote 16 (21), CDL offers two quotations. One is from an unnamed and uncited 1887 opinion. This is *Mugler* v. *Kansas,* 123 U. S. 623, a case upholding a liquor-prohibition law. No question of freedom of expression was involved there. The material in parentheses in the CDL quotation is the CDL's language, not the Court's. And the "such questions" to which the Court's language refers are described in the preceding sentence of the opinion, which CDL does not include:

> "But by whom, or by what authority, is it to be determined whether the manufacture of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public?" (123 U. S. 623, 660).

The other quotation is from *Trist* v. *Child,* 88 U. S. 441. *Trist* v. *Child* was not an obscenity case, nor did it involve morality in the sense in which CDL uses the term. The Court held, *inter alia,* that a contract to pay for services in securing Congressional enactment of a bill to pay Trist for his work in connection with the Treaty of Guadelupe Hidalgo was unenforceable as against public policy. The opinion is in no way authority for CDL's views on

sexual morality and the suppression of books. The decision rests on the public interest in preventing interference with the legislative process. Moreover, far from supporting CDL's attitude toward the Bill of Rights, the opinion emphasizes the importance of the guaranteed freedoms. CDL omits the conclusion of the *Trist* paragraph which it quotes. The conclusion is as follows:

> "* * * No people can have any higher public interest, *except the protection of their liberties,* than integrity in the administration of their government in all its departments." (88 U. S. 441, 450-451.) (Emphasis supplied.)

CDL complains that appellant's reply to the first amicus brief omits part of the report of *Curl's* case (20) . For one thing, the "omitted" part was set forth in the first CDL brief (at pages 57-58). For another, this portion of the report, which CDL has now quoted a second time, adds nothing—either for or against—to the point made in appellant's supplemental brief. The rationale of *Curl's* case was that the suppression of speech and writing ought to be used as a government tool against sedition, against heresy, and against expression thought to be damaging to the prevailing sexual morality. The point made in appellant's reply was that this philosophy of government is not the philosophy of our government, and that it was explicitly rejected in the adoption of the First Amendment.* Anti-obscenity legislation has a valid scope of operation, but it is a scope severely limited by constitutional guaranties

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* "* * * to assume that English common law in this field became ours is to deny the generally accepted historical belief that 'one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press.' * * *

"* * * No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed. * * *" (*Bridges* v. *California,* 314 U. S. 252, 264, 265).

that were not in existence at the time of *Curl's* case. The theory of *Curl's* case would require a different result in *Kingsley Pictures* v. *Regents*, 360 U. S. 684. It is a theory that is completely foreign to the spirit of *Roth-Alberts*. It cuts deeply into the fabric of freedom and stands in rigid opposition to the solicitude for First Amendment protections shown in *Roth* and *Alberts*. Yet that destructive rationale, as the repeated reliance on *Rex* v. *Curl* shows, is the very essence of the CDL position.

IV.

CDL deals with the right to jury trial as though the Sixth Amendment spoke not of the right of "the accused", but of a right of the prosecution (23-24; also footnote 7 on p. 8). CDL then confuses the "full hearing" that the First Amendment assures for the publication of conflicting views with "full hearing" in the courtroom. In any event, the litigant's choice of whether he will or will not have a jury has no relevance to the question of what speech and writing are protected by the First Amendment.

V.

Footnote 20 (25) presents one of several illustrations the CDL furnishes of the necessity for deciding cases on the record and on matters as to which judicial notice may be taken. CDL states:

> "It is a recognized fact that publishers locate themselves in the liberal jurisdictions and take sanctuary in the relatively low risk of state prosecution."

It is, on the contrary, a recognized fact that appellant and most other leading publishers have long been located in New York City for reasons in no way connected with anti-obscenity laws. In any event, a state that has held the works of Edmund Wilson and Henry Miller obscene would

be a poor choice if the book publishing industry had the motivation that CDL ascribes to it.

CDL concludes with an assertion that appellant has made an "attempt to prove that the rights of a publisher *under all circumstances* are paramount to the police right of community government" (26). (Italics by CDL.) No such contention has appeared anywhere in appellant's briefs or oral argument. Appellant has at no point urged the invalidation of all anti-obscenity legislation, or of the particular statute involved here. Appellant's position, rather, has been that, under the tests set forth by this Court, the specific book in issue is protected against suppression by the First Amendment.

The foregoing is representative but not exhaustive. If the CDL's proposed second brief is to be considered as a document in the case, appellant, we submit, should have an opportunity to deal with its distortions and inaccuracies other than those mentioned above, and to deal with those mentioned in full detail.

Since the arguments on the merits contained in the proposed second brief are in substance the same as those in CDL's extensive first brief, we submit that the motion should be denied. If, however, the motion should be granted, we ask that appellant be given leave to submit a brief in response.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 368.—October Term, 1965.

A Book Named "John Cleland's Memoirs of a Woman of Pleasure," et al., Appellants, *v.* Attorney General of the Commonwealth of Massachusetts.	On Appeal From the Supreme Judicial Court of Massachusetts.

[March 21, 1966.]

Mr. Justice Brennan announced the judgment of the Court and delivered an opinion in which The Chief Justice and Mr. Justice Fortas join.

This is an obscenity case in which *Memoirs of a Woman of Pleasure* (commonly known as *Fanny Hill*), written by John Cleland in about 1750, was adjudged obscene in a proceeding that put on trial the book itself, and not its publisher or distributor. The proceeding was a civil equity suit brought by the Attorney General of Massachusetts, pursuant to General Laws of Massachusetts, Chapter 272, §§ 28C–28H, to have the book declared obscene.[1] Section 28C requires that the petition commencing the suit be "directed against [the] book by name" and that an order to show cause "why said book should not be judicially determined to be obscene" be published in a daily newspaper and sent by registered mail "to all persons interested in the publication." Publication of the order in this case occurred in a Boston daily newspaper, and a copy of the order was sent by registered mail to G. P. Putnam's Sons, alleged to be the publisher and copyright holder of the book.

As authorized by § 28D, G. P. Putnam's Sons intervened in the proceedings in behalf of the book, but it

[1] The text of the statute appears in the Appendix.

did not claim the right provided by that section to have the issue of obscenity tried by a jury. At the hearing before a justice of the Superior Court, which was conducted, under § 28F, "in accordance with the usual course of proceedings in equity," the court received the book in evidence and also, as allowed by the section, heard the testimony of experts [2] and accepted other evidence, such

[2] In dissenting from the Supreme Judicial Court's disposition in this case, — Mass. —, —, 206 N. E. 2d 403, 406–407 (1965), Justice Whittemore summarized this testimony:

"In the view of one or another or all of the following viz., the chairman of the English department at Williams College, a professor of English at Harvard College, an associate professor of English literature at Boston University, an associate professor of English at Massachusetts Institute of Technology, and an assistant professor of English and American literature at Brandeis University, the book is a minor 'work of art' having 'literary merit' and 'historical value' and containing a good deal of 'deliberate, calculated comedy.' It is a piece of 'social history of interest to anyone who is interested in fiction as a way of understanding society in the past.' [1] A saving grace is that although many scenes, if translated

"[1] One of the witnesses testified in part as follows: 'Cleland is part of what I should call this cultural battle that is going on in the 18th century, a battle between a restricted Puritan, moralistic ethic that attempts to suppress freedom of the spirit, freedom of the flesh, and this element is competing with a freer attitude towards life, a more generous attitude towards life, a more wholesome attitude towards life, and this very attitude that is manifested in Fielding's great novel "Tom Jones" is also evident in Cleland's novel. . . . [Richardson's] "Pamela" is the story of a young country girl; [his] "Clarissa" is the story of a woman trapped in a house of prostitution. Obviously, then Cleland takes both these themes, the country girl, her initiation into life and into experience, and the story of a woman in a house of prostitution, and what he simply does is to take the situation and reverse the moral standards. Richardson believed that chastity was the most important thing in the world; Cleland and Fielding obviously did not and thought there were more important significant moral values.' "

into the present day language of 'the realistic, naturalistic novel, could be quite offensive' these scenes are not described in such

as book reviews, in order to assess the literary, cultural, or educational character of the book. This constituted the entire evidence, as neither side availed itself of the opportunity provided by the section to introduce evidence "as to the manner and form of its publication, advertisement, and distribution." [3] The trial justice entered a final decree, which adjudged *Memoirs* obscene and declared that the book "is not entitled to the protection of the First and Fourteenth amendments to the Constitution of the United States against action by the Attorney General or other law enforcement officers pursuant to the provisions of . . . § 28B, or otherwise." [4]

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language. The book contains no dirty words and its language 'functions . . . to create a distance, even when the sexual experiences are portrayed.' The response, therefore, is a literary response. The descriptions of depravity are not obscene because 'they are subordinate to an interest which is primarily literary'; Fanny's reaction to the scenes of depravity was 'anger,' 'disgust, horror [and], indignation.' The book 'belongs to the history of English literature rather than the history of smut.' [2] "

"[2] In the opinion of the other academic witness, the headmaster of a private school, whose field is English literature, the book is without literary merit and is obscene, impure, hard core pornography, and is patently offensive."

[3] The record in this case is thus significantly different from the records in *Ginzburg* v. *United States*, *post*, and *Mishkin* v. *New York*, *post*, also decided today. See pp. 6–7, *infra*.

[4] Section 28B makes it a criminal offense, *inter alia*, to import, print, publish, sell, loan, distribute, buy, procure, receive, or possess for the purpose of sale, loan, or distribution, "a book, knowing it to be obscene." Section 28H provides that in any prosecution under § 28B the decree obtained in a proceeding against the book "shall be admissible in evidence" and further that "if prior to said offense a final decree had been entered against the book, the defendant, if the book be obscene . . . shall be conclusively presumed to have known said book to be obscene. . . ." Thus a declaration of obscenity such as that obtained in this proceeding is likely to result in the total suppression of the book in the Commonwealth.

The constitutionality of § 28H has not been challenged in this appeal.

The Massachusetts Supreme Judicial Court affirmed the decree. — Mass. —, 206 N. E. 2d 403 (1965). We noted probable jurisdiction. 382 U. S. 900. We reverse.[5]

I.

The term "obscene" appearing in the Massachusetts statute has been interpreted by the Supreme Judicial Court to be as expansive as the Constitution permits: the "statute covers all material that is obscene in the constitutional sense." *Attorney General* v. *A Book Named "Tropic of Cancer,"* 345 Mass. 11, 13, 184 N. E. 2d 328, 330 (1962). Indeed, the final decree before us equates the finding that *Memoirs* is obscene within the meaning of the statute with the declaration that the book is not entitled to the protection of the First Amendment.[6] Thus the sole question before the state courts was whether *Memoirs* satisfies the test of obscenity established in *Roth* v. *United States*, 354 U. S. 476.

We defined obscenity in *Roth* in the following terms: "Whether to the average persons, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 354 U. S., at 489. Under this definition, as elaborated in

[5] Although the final decree provides no coercive relief but only a declaration of the book's obscenity, our adjudication of the merits of the issue tendered, viz., whether the state courts erred in declaring the book obscene, is not premature. There is no uncertainty as to the content of the material challenged, and the Attorney General's petition commencing this suit states that the book "is being imported, sold, loaned, or distributed in the Commonwealth." The declaration of obscenity is likely to have a serious inhibitory effect on the distribution of the book, and this probable impact is to no small measure derived from possible collateral uses of the declaration in subsequent prosecutions under the Massachusetts criminal obscenity statute. See n. 4, *supra*.

[6] We infer from the opinions below that the other adjectives describing the proscribed books in §§ 28C–28H, "indecent" and "impure," have either been read out of the statute or deemed synonymous with "obscene."

subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

The Supreme Judicial Court purported to apply the *Roth* definition of obscenity and held all three criteria satisfied. We need not consider the claim that the court erred in concluding that *Memoirs* satisfied the prurient appeal and patent offensiveness criteria; for reversal is required because the court misinterpreted the social value criterion. The court applied the criterion in this passage:

> "It remains to consider whether the book can be said to be 'utterly without social importance.' We are mindful that there was expert testimony, much of which was strained, to the effect that Memoirs is a structural novel with literary merit; that the book displays a skill in characterization and a gift for comedy; that it plays a part in the history of the development of the English novel; and that it contains a moral, namely, that sex with love is superior to sex in a brothel. But the fact that the testimony may indicate this book has some minimal literary value does not mean it is of any social importance. We do not interpret the 'social importance' test as requiring that a book which appeals to prurient interest and is patently offensive must be unqualifiedly worthless before it can be deemed obscene." —— Mass., at ——, 206 N. E. 2d, at 406.

The Supreme Judicial Court erred in holding that a book need not be "unqualifiedly worthless before it can be deemed obscene." A book can not be proscribed unless it is found to be *utterly* without redeeming social

value. This is so even though the book is found to possess the requisite prurient appeal and to be patently offensive. Each of the three federal constitutional criteria is to be applied independently; the social value of the book can neither be weighed against nor canceled by its prurient appeal or patent offensiveness.[7] Hence, even on the view of the court below that *Memoirs* possessed only a modicum of social value, its judgment must be reversed as being founded on an erroneous interpretation of a federal constitutional standard.

II.

It does not necessarily follow from this reversal that a determination that *Memoirs* is obscene in the constitutional sense would be improper under all circumstances. On the premise, which we have no occasion to assess, that *Memoirs* has the requisite prurient appeal and is patently offensive, but has only a minimum of social value, the circumstances of production, sale, and publicity are relevant in determining whether or not the publication and distribution of the book is constitutionally protected. Evidence that the book was commercially exploited for the sake of prurient appeal, to the exclusion of all other values, might justify the conclusion that the book was utterly without redeeming social importance. It is not that in such a setting the social

[7] "[M]aterial dealing with sex in a manner that advocates ideas . . . or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity and denied the constitutional protection. Nor may the constitutional status of the material be made to turn on a 'weighing' of its social importance against its prurient appeal, for a work cannot be proscribed unless it is 'utterly' without social importance. See *Zeitlin* v. *Arnebergh*, 59 Cal. 2d 901, 920, 383 P. 2d 152, 165, 31 Cal. Rptr. 800, 813 (1963)." *Jacobellis* v. *Ohio*, 378 U. S. 184, 191 (opinion of BRENNAN, J.). Followed in, *e. g.*, *People* v. *Bruce*, 31 Ill. 2d 459, 461, 202 N. E. 2d 497, 498 (1964); *Trans-Lux Distributing Corp.* v. *Maryland Bd. of Censors*, 240 Md. 98, 104–105, 213 A. 2d 235, 238–239 (1965).

value test is relaxed so as to dispense with the requirement that a book be *utterly* devoid of social value, but rather that, as we elaborate in *Ginzburg* v. *United States*, *post*, pp. 7–10, where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, a court could accept his evaluation at its face value. In this proceeding, however, the courts were asked to judge the obscenity of *Memoirs* in the abstract, and the declaration of obscenity was neither aided nor limited by a specific set of circumstances of production, sale, and publicity.[8] All possible uses of the book must therefore be considered, and the mere risk that the book might be exploited by panderers because it so pervasively treats sexual matters cannot alter the fact—given the view of the Massachusetts court attributing to *Memoirs* a modicum of literary and historical value—that the book will have redeeming social importance in the hands of those who publish or distribute it on the basis of that value.

Reversed.

MR. JUSTICE BLACK and MR. JUSTICE STEWART concur in the reversal for the reasons stated in their respective dissenting opinions in *Ginzburg* v. *United States*, *post*, — at —, and *Mishkin* v. *New York*, *post*, — at —.

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[8] In his dissenting opinion, 206 N. E. 2d, at 408–409, Justice Cutter stated that, although in his view the book was not "obscene" within the meaning of *Roth*, "it could reasonably be found that distribution of the book to persons under the age of eighteen would be a violation of G. L. c. 272, § 28, as tending to corrupt the morals of youth." (Section 28 makes it a crime to sell to "a person under eighteen a book . . . which is obscene . . . or manifestly tends to corrupt the morals of youth.") He concluded that the court should "limit the relief granted to a declaration that distribution of this book to persons under the age of eighteen may be found to constitute a violation of [G. L.] c. 272, § 28, if that section is reasonably applied. . . ." However, the decree was not so limited and we intimate no view concerning the constitutionality of such a limited declaration regarding *Memoirs*. Cf. *Jacobellis* v. *Ohio*, 378 U. S., at 195.

APPENDIX.

State Statute.

Massachusetts General Laws, Chapter 272.

. . . . .

Section 28B. Whoever imports, prints, publishes, sells, loans or distributes, or buys, procures, receives, or has in his possession for the purpose of sale, loan or distribution, a book, knowing it to be obscene, indecent or impure, or whoever, being a wholesale distributor, a jobber, or publisher sends or delivers to a retail storekeeper a book, pamphlet, magazine or other form of printed or written material, knowing it to be obscene, indecent or impure, which said storekeeper had not previously ordered in writing, specifying the title and quantity of such publication he desired, shall be punished by imprisonment in the state prison for not more than five years or in a jail or house of correction for not more than two and one half years, or by a fine of not less than one hundred dollars nor more than five thousand dollars, or by both such fine and imprisonment in jail or the house of correction.

Section 28C. Whenever there is reasonable cause to believe that a book which is being imported, sold, loaned or distributed, or is in the possession of any person who intends to import, sell, loan or distribute the same, is obscene, indecent or impure, the attorney general, or any district attorney within his district, shall bring an information or petition in equity in the superior court directed against said book by name. Upon the filing of such information or petition in equity, a justice of the superior court shall, if, upon a summary examination of the book, he is of opinion that there is reasonable cause to believe that such book is obscene, indecent or impure, issue an order of notice, returnable in or within thirty days, directed against such book by name and addressed to all

persons interested in the publication, sale, loan or distribution thereof, to show cause why said book should not be judicially determined to be obscene, indecent or impure. Notice of such order shall be given by publication once each week for two successive weeks in a daily newspaper published in the city of Boston and, if such information or petition be filed in any county other than Suffolk county, then by publication also in a daily newspaper published in such other county. A copy of such order of notice shall be sent by registered mail to the publisher of said book, to the person holding the copyrights, and to the author, in case the names of any such persons appear upon said book, fourteen days at least before the return day of such order of notice. After the issuance of an order of notice under the provisions of this section, the court shall, on motion of the attorney general or district attorney, make an interlocutory finding and adjudication that said book is obscene, indecent or impure, which finding and adjudication shall be of the same force and effect as the final finding and adjudication provided in section twenty-eight E or section twenty-eight F, but only until such final finding and adjudication is made or until further order of the court.

SECTION 28D. Any person interested in the sale, loan or distribution of said book may appear and file an answer on or before the return day named in said notice or within such further time as the court may allow, and may claim a right to trial by jury on the issue whether said book is obscene, indecent or impure.

SECTION 28E. If no person appears and answers within the time allowed, the court may at once upon motion of the petitioner, or of its own motion, no reason to the contrary appearing, order a general default and if the court finds that the book is obscene, indecent or impure, may make an adjudication against the book that the same is obscene, indecent and impure.

SECTION 28F. If an appearance is entered and answer filed, the case shall be set down for speedy hearing, but a default and order shall first be entered against all persons who have not appeared and answered, in the manner provided in section twenty-eight E. Such hearing shall be conducted in accordance with the usual course of proceedings in equity including all rights of exception and appeal. At such hearing the court may receive the testimony of experts and may receive evidence as to the literary, cultural or education character of said book and as to the manner and form of its publication, advertisement, and distribution. Upon such hearing, the court may make an adjudication in the manner provided in said section twenty-eight E.

SECTION 28G. An information or petition in equity under the provisions of section twenty-eight C shall not be open to objection on the ground that a mere judgment, order or decree is sought thereby and that no relief is or could be claimed thereunder on the issue of the defendant's knowledge as to the obscenity, indecency or impurity of the book.

SECTION 28H. In any trial under section twenty-eight B on an indictment found or a complaint made for any offence committed after the filing of a proceeding under section twenty-eight C, the fact of such filing and the action of the court or jury thereon, if any, shall be admissible in evidence. If prior to the said offence a final decree had been entered against the book, the defendant, if the book be obscene, indecent or impure, shall be conclusively presumed to have known said book to be obscene, indecent or impure, or if said decree had been in favor of the book he shall be conclusively presumed not to have known said book to be obscene, indecent or impure, or if no final decree had been entered but a proceeding had been filed prior to said offence, the defendant shall be conclusively presumed to have had knowledge of the contents of said book.

SUPREME COURT OF THE UNITED STATES

No. 368.—October Term, 1965.

A Book Named "John Cleland's Memoirs of a Woman of Pleasure," et al., Appellants, *v.* Attorney General of the Commonwealth of Massachusetts.	On Appeal From the Supreme Judicial Court of Massachusetts.

[March 21, 1966.]

Mr. Justice Douglas, concurring.

Memoirs of a Woman of Pleasure, or, as it is often titled, *Fanny Hill*, concededly is an erotic novel. It was first published in about 1749 and has endured to this date, despite periodic efforts to suppress it.[1] The book relates the adventures of a young girl who becomes a prostitute in London. At the end, she abandons that life and marries her first lover, observing:

> "Thus, at length, I got snug into port, where, in the bosom of virtue, I gather'd the only uncorrupt sweets: where, looking back on the course of vice I had run, and comparing its infamous blandishments with the infinitely superior joys of innocence, I could not help pitying, even in point of taste, those who, immers'd in gross sensuality, are insensible to the so delicate charms of VIRTUE, than which even PLEASURE has not a greater friend, nor than VICE a greater enemy. Thus temperance makes men lords over those pleasures that intemperance enslaves them to: the one, parent of health, vigour,

[1] *Memoirs* was the subject of what is generally regarded as the first recorded suppression of a literary work in this country on grounds of obscenity. See *Commonwealth* v. *Holmes*, 17 Mass. 335 (1821). The edition there condemned differed from the present volume in that it contained apparently erotic illustrations.

> fertility, cheerfulness, and every other desirable good of life; the other, of diseases, debility, barrenness, self-loathing, with only every evil incident to human nature.
>
> ". . . The paths of Vice are sometimes strew'd with roses, but then they are for ever infamous for many a thorn, for many a cankerworm: those of Virtue are strew'd with roses purely, and those eternally unfading ones." [2]

In 1963, an American publishing house undertook the publication of *Memoirs*. The record indicates that an unusually large number of orders were placed by universities and libraries; the Library of Congress requested the right to translate the book into Braille. But the Commonwealth of Massachusetts instituted the suit that ultimately found its way here, praying that the book be declared obscene so that the citizens of Massachusetts might be spared the necessity of determining for themselves whether or not to read it.

The courts of Massachusetts found the book "obscene" and upheld its suppression. This Court reverses, the prevailing opinion having seized upon language in the opinion of the Massachusetts Supreme Judicial Court in which it is candidly admitted that *Fanny Hill* has at least "some minimal literary value." I do not believe that the Court should decide this case on so disingenuous a basis as this. I base my vote to reverse on my view that the First Amendment does not permit the censorship of expression not brigaded with illegal action. But even applying the prevailing view of the *Roth* test, reversal is compelled by this record which makes clear that *Fanny Hill* is not "obscene." The prosecution made virtually no effort to prove that this book is "utterly without redeeming social importance." The defense, on the

[2] *Id.*, at pp. 213–214 (Putnam ed. 1963).

other hand, introduce considerable and impressive testimony to the effect that this was a work of literary, historical, and social importance.[3]

We are judges, not literary experts or historians or philosophers. We are not competent to render an independent judgment as to the worth of this or any other book, except as in our capacity as private citizens. I would pair my Brother CLARK on *Fanny Hill* with the Universalist minister I quote in the Appendix. If there is to be censorship, the wisdom of experts on such matters as literary merit and historical significance must be evaluated. On this record, the Court has no choice but to reverse the judgment of the Massachusetts Supreme Judicial Court, irrespective of whether we would include *Fanny Hill* in our own libraries.

Four of the seven Justices of the Massachusetts Supreme Judicial Court conclude that *Fanny Hill* is obscene. —— Mass. ——, 206 N. E. 2d 403. Four of the seven Justices of the New York Court of Appeals conclude that it is not obscene. *Larken* v. *Putnam's Sons*,

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[3] The defense drew its witnesses from the various colleges located within the State of Massachusetts. These included: Fred Holly Stocking, Professor of English and Chairman of the English Department, Williams College; John M. Bullitt, Professor of English and Master of Quincy House, Harvard College; Robert H. Sproat, Associate Professor of English Literature, Boston University; Norman N. Holland, Associate Professor of English, Massachusetts Institute of Technology; and Ira Konigsberg, Assistant Professor of English and American Literature, Brandeis University.

In addition, the defense introduced into evidence reviews of impartial literary critics. These are, in my opinion, of particular significance since their publication indicates that the book is of sufficient significance as to warrant serious critical comment. The reviews were by V. S. Pritchett, New York Review of Books, p. 1 (Oct. 31, 1963); Brigid Brophy, New Statesman, p. 710 (Nov. 15, 1963); and J. Donald Adams, New York Times Book Review, p. 2 (July 28, 1963). And the Appendix to this opinion contains another contemporary view.

14 N. Y. 2d 399, 200 N. E. 2d 760. To outlaw the book on such a voting record would be to let majorities rule where minorities were thought to be supreme. The Constitution forbids abridgment of "freedom of speech, or of the press." Censorship is the most notorious form of abridgment. It substitutes majority rule where minority tastes or viewpoints were to be tolerated.

It is to me inexplicable how a book that concededly has social worth can on remand nonetheless be banned because of the manner in which it is advertised and sold. However florid its cover, whatever the pitch of its advertisements, the contents remain the same.

Every time an obscenity case is to be argued here, my office is flooded with letters and postal cards urging me to protect the community or the Nation by striking down the publication. The messages are often identical even down to commas and semicolons. The inference is irresistible that they were all copied from a school or church blackboard. Dozens of postal cards often are mailed from the same precinct. The drives are incessant and the pressures are great. Happily we do not bow to them. I mention them only to emphasize the lack of popular understanding of our constitutional system. Publications and utterances were made immune from majoritarian control by the First Amendment, applicable to the States by reason of the Fourteenth. No exceptions were made, not even for obscenity. The Court's contrary conclusion in *Roth*, where obscenity was found to be "outside" the First Amendment, is without justification.

The extent to which the publication of "obscenity" was a crime at common law is unclear. It is generally agreed that the first reported case involving obscene conduct is *The King* v. *Sir Charles Sedley*.[4] Publica-

[4] There are two reports of the case. The first is captioned *Le Roy* v. *Sr. Charles Sidney*, 1 Sid. 168, pl. 29 (K. B. 1663); the second

tion of obscene literature, at first thought to be the exclusive concern of the ecclesiastical courts,[5] was not held to constitute an indictable offense until 1727.[6] A later case involved the publication of an "obscene and impious libel" (a bawdy parody of Pope's "Essay on Man") by a member of the House of Commons.[7] On the basis of these few cases, one cannot say that the common-law doctrines with regard to publication of obscenity were anything but uncertain. "There is no definition of the term. There is no basis of identification. There is no unity in describing what is obscene literature, or in prosecuting it. There is little more than the ability to smell it." Alpert, Judicial Censorship of Obscene Literature, 52 Harv. L. Rev. 40, 47 (1938).

But even if the common law had been more fully developed at the time of the adoption of the First Amendment, we would not be justified in assuming that the Amendment left the common law unscathed. In *Bridges* v. *California*, 314 U. S. 252, 264–265, we said:

> "[T]o assume that English common law in this field became ours is to deny the generally accepted

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is titled *Sir Charles Sydlyes Case*, 1 Keble 620 (K. B. 1663). Sir Charles had made a public appearance on a London balcony while nude, intoxicated, and talkative. He delivered a lengthy speech to the assembled crowd, uttered profanity, and hurled bottles containing what was later described as an "offensive liquor" upon the crowd. The proximate source of the "offensive liquor" appears to have been Sir Charles. Alpert, Judicial Censorship of Obscene Literature, 52 Harv. L. Rev. 40–43 (1938).

[5] *The Queen* v. *Read*, 11 Mod. 142 (Q. B. 1708).

[6] *Dominus Rex* v. *Curl*, 2 Strange 789 (K. B. 1727). See Straus, The Unspeakable Curll (1927).

[7] *Rex* v. *Wilkes*, 4 Burr. 2527 (K. B. 1770). The prosecution of Wilkes was a highly political action, for Wilkes was an outspoken critic of the government. See R. W. Postgate, That Devil Wilkes (1929). It has been suggested that the prosecution in this case was a convenient substitute for the less attractive charge of seditious libel. See Alpert, *supra*, at 45.

historical belief that 'one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press.' Schofield, Freedom of the Press in the United States, 9 Publications Amer. Sociol. Soc., 67, 76.

"More specifically, it is to forget the environment in which the First Amendment was ratified. In presenting the proposals which were later embodied in the Bill of Rights, James Madison, the leader in the preparation of the First Amendment, said: 'Although I know whenever the great rights, the trial by jury, freedom of the press, or liberty of conscience, come in question in that body [Parliament], the invasion of them is resisted by able advocates, yet their Magna Charta does not contain any one provision for the security of those rights, respecting which the people of America are most alarmed. The freedom of the press and rights of conscience, those choicest privileges of the people, are unguarded in the British Constitution.' "

And see *Grosjean* v. *American Press Co.*, 297 U. S. 233, 248–249.

It is true, as the Court observed in *Roth*, that obscenity laws appeared on the books of a handful of States at the time the First Amendment was adopted.[8] But the First Amendment was, until the adoption of the Fourteenth, a restraint only upon federal power. Moreover, there is an absence of any *federal* cases or laws

[8] See 354 U. S., at 483 and n. 13. For the most part, however, the early legislation was aimed at blasphemy and profanity. See 354 U. S., at 482–483 and n. 12. The first reported decision involving the publication of obscene literature does not come until 1821. See *Commonwealth* v. *Holmes*, 17 Mass. 335. It was not until after the Civil War that state prosecutions of this sort became commonplace. See Lockhart and McClure, Literature, The Law of Obscenity, and the Constitution, 38 Minn. L. Rev. 295, 324–325 (1954).

relative to obscenity in the period immediately after the adoption of the First Amendment. Congress passed no legislation relating to obscenity until the middle of the nineteenth century.[9] Neither reason nor history warrants exclusion of any particular class of expression from the protection of the First Amendment on nothing more than a judgment that it is utterly without merit. We faced the difficult questions the First Amendment poses with regard to libel in *New York Times* v. *Sullivan*, 376 U. S. 254, 269, where we recognized that "libel can claim no talismanic immunity from constitutional limitations." We ought not to permit fictionalized assertions of constitutional history to obscure those questions here. Were the Court to undertake that inquiry, it would be unable, in my opinion, to escape the conclusion that no interest of society with regard to suppression of "obscene" literature could override the First Amendment to justify censorship.

The censor is always quick to justify his function in terms that are protective of society. But the First Amendment, written in terms that are absolute, deprives the State of any power to pass on the value, the propriety, or the morality of a particular expression. Cf. *Kingsley Int. Pictures Corp.* v. *Regents*, 360 U. S. 684, 688–689; *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495. Perhaps the most frequently assigned justification for censorship is the belief that erotica produces antisocial sexual conduct. But that relationship has yet to be proven.[10] Indeed, if one were to make judgments on the

[9] Tariff Act of 1842, c. 270, § 28, 5 Stat. 566 (prohibiting importation of obscene "prints"). Other federal legislation followed; the development of federal law is traced in Cairns, Paul, and Wishner, Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence, 46 Minn. L. Rev. 1009, 1010 n. 2 (1962).

[10] See Cairns, Paul, and Wishner, Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence, 46 Minn. L. Rev. 1009, 1034–1041 (1962); Lockhart and McClure, *supra*,

basis of speculation, one might guess that literature of the most pornographic sort would, in many cases, provide a substitute—not a stimulus—for antisocial sexual conduct. See Murphy, The Value of Pornography, 10 Wayne L. Rev. 655, 661 and n. 19 (1964). As I read the First Amendment, judges cannot gear the literary diet of an entire nation to whatever tepid stuff is incapable of triggering the most demented mind. The First Amendment demands more than a horrible example or two of the perpetrator of a crime of sexual violence, in whose pocket is found a pornographic book, before it allows the Nation to be saddled with a regime of censorship.[11]

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at 382–387. And see the summary of Dr. Jahoda's studies prepared by her for Judge Frank, reprinted in *United States* v. *Roth*, 237 F. 2d 796, 815–816 (concurring opinion). Those who are concerned about children and erotic literature would do well to consider the counsel of Judge Bok:

"It will be asked whether one would care to have one's young daughter read these books. I suppose that by the time she is old enough to wish to read them she will have learned the biologic facts of life and the words that go with them. There is something seriously wrong at home if those facts have not been met and faced and sorted by then; it is not children so much as parents that should receive our concern about this. I should prefer that my own three daughters meet the facts of life and the literature of the world in my library than behind a neighbor's barn, for I can face the adversary there directly. If the young ladies are appalled by what they read, they can close the book at the bottom of page one; if they read further, they will learn what is in the world and in its people, and no parents who have been discerning with their children need fear the outcome. Nor can they hold it back, for life is a series of little battles and minor issues, and the burden of choice is on us all, every day, young and old." *Commonwealth* v. *Gordon*, 66 Pa. D. & C. 101, 110.

[11] It would be a futile effort even for a censor to attempt to remove all that might possibly stimulate antisocial sexual conduct:

"The majority [of individuals], needless to say, are somewhere in between the over-scrupulous extremes of excitement and frigid-

Whatever may be the reach of the power to regulate *conduct*, I stand by my view in *Roth* v. *United States*, *supra*, that the First Amendment leaves no power in government over *expression of ideas*.

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ity . . . . Within this variety, it is impossible to define 'hard-core' pornography, as if there were some singly lewd concept from which all profane ideas passed by imperceptible degrees into that sexuality called holy. But there is no 'hard core.' Everything, every idea, is capable of being obscene if the personality perceiving it so apprehends it.

"It is for this reason that books, pictures, charades, ritual, the spoken word, *can* and *do* lead to conduct harmful to the self indulging in it and to others. Heinrich Pommerenke, who was a rapist, abuser, and mass slayer of women in Germany, was prompted to his series of ghastly deeds by Cecil B. DeMille's *The Ten Commandments*. During the scene of the Jewish women dancing about the Golden Calf, all the doubts of his life came clear: Women were the source of the world's trouble and it was his mission to punish them for this and to execute them. Leaving the theatre, he slew his first victim in a park nearby. John George Haigh, the British vampire who sucked his victims' blood through soda straws and dissolved their drained bodies in acid baths, first had his murder-inciting dreams and vampire-longings from watching the 'voluptuous' procedure of--an Anglican High Church Service!" Murphy, *supra*, at 668.

APPENDIX.

Dr. Peale and Fanny Hill.

An Address by
Rev. John R. Graham, First Universalist Church of Denver.

December 1965.

. . . . .

At the present point in the twentieth century, it seems to me that there are two books which symbolize the human quest for what is moral. *Sin, Sex and Self-Control* by Dr. Norman Vincent Peale, the well-known clergyman of New York City, portrays the struggle of contemporary middle-class society to arrive at a means of stabilizing behavior patterns. At the same time, there is a disturbing book being sold in the same stores with Dr. Peale's volume. It is a seventeenth century English novel by John Cleland and it is known as *Fanny Hill: The Memoirs of a Woman of Pleasure.*

Quickly, it must be admitted that it appears that the two books have very little in common. One was written in a day of scientific and technological sophistication, while the other is over two hundred years old. One is acclaimed in the pulpit, while the other is protested before the United States Supreme Court. *Sin, Sex and Self-Control* is authored by a Christian pastor, while *Fanny Hill* represents thoughts and experiences of a common prostitute. As far as the general public seems to be concerned, one is moral and the other is hopelessly immoral. While Dr. Peale is attempting to redeem the society, most people believe that *Fanny Hill* can only serve as another instance in an overall trend toward an immoral social order. Most parents would be pleased to find their children reading a book by Dr. Peale, but I am afraid that the same parents would be sorely distressed to discover a copy of *Fanny Hill* among the school books of their offspring.

Although one would not expect to find very many similarities between the thoughts of a pastor and those of a prostitute, the very subject matter of the two books is, in many ways, strangely similar. While the contents are radically different, the concerns are the same. Both authors deal with human experience. They are concerned with people and what happens to them in the world in which they live each day. But most significantly of all, both books deal with the age-old question of "What is moral?" I readily admit that this concern with the moral is more obvious in Dr. Peale's book than it is in the one by John Cleland. The search for the moral in *Fanny Hill* is clothed in erotic passages which seem to equate morality with debauchery as far as the general public is concerned. At the same time, Dr. Peale's book is punctuated with such noble terms as "truth," "love," and "honesty."

These two books are not very important in themselves. They may or may not be great literature. Whether they will survive through the centuries to come is a question, although John Cleland has an historical edge on Norman Vincent Peale! However, in a symbolic way they do represent the struggle of the moral quest and for this reasor they are important.

Dr. Peale begins his book with an analysis of contemporary society in terms of the moral disorder which is more than obvious today. He readily admits that the traditional Judeo-Christian standards of conduct and behavior no longer serve as strong and forceful guides. He writes:

> "For more than forty years, ever since my ordination, I had been preaching that if a person would surrender to Jesus Christ and adopt strong affirmative attitudes toward life he would be able to live abundantly and triumphantly. I was still absolutely convinced that this was true. But I was also

> bleakly aware that the whole trend in the seventh decade of the twentieth century seemed to be away from the principles and practices of religion—not toward them." (Page 1.)

Dr. Peale then reflects on the various changes that have taken place in our day and suggests that although he is less than enthusiastic about the loss of allegiance to religion, he is, nevertheless, willing to recognize that one cannot live by illusion.

After much struggle, Dr. Peale then says that he was able to develop a new perspective on the current moral dilemma of our times. What first appeared to be disaster was really opportunity. Such an idea, coming from him, should not be very surprising, since he is more or less devoted to the concept of "positive thinking!" He concludes that our society should welcome the fact that the old external authorities have fallen. He does not believe that individuals should ever be coerced into certain patterns of behavior.

According to Dr. Peale, we live in a day of challenge. Our society has longed for a time when individuals would be disciplined by self-control, rather than being motivated by external compunction. Bravely and forthrightfully, he announces that the time has now come when self-control can and must replace external authority. He is quick to add that the values contained in the Judeo-Christian tradition and "the American way of life" must never be abandoned for they emanate from the wellsprings of "Truth." What has previously been only an external force must now be internalized by individuals.

In many ways, Dr. Peale's analysis of the social situation and the solution he offers for assisting the individual to stand against the pressures of the times, come very close to the views of Sigmund Freud. He felt that society could and would corrupt the individual and, as a

result, the only sure defense was a strong super-ego or conscience. This is precisely what Dr. Peale recommends.

Interestingly enough John Cleland, in *Fanny Hill,* is concerned with the same issues. Although the question of moral behavior is presented more subtly in his book, the problem with which he deals is identical. There are those who contend that the book is wholly without redeeming social importance. They feel that it appeals only to prurient interests.

I firmly believe that *Fanny Hill* is a moral, rather than an immoral, piece of literature. In fact, I will go as far as to suggest that it represents a more significant view of morality than is represented by Dr. Peale's book *Sin, Sex and Self-Control.* As is Dr. Peale, Cleland is concerned with the nature of the society and the relationship of the individual to it. *Fanny Hill* appears to me to be an allegory. In the story, the immoral becomes the moral and the unethical emerges as the ethical. Nothing is more distressing than to discover that what is commonly considered to be evil may, in reality, demonstrate characteristics of love and concern.

There is real irony in the fact that Fanny Hill, a rather naive young girl who becomes a prostitute, finds warmth, understanding and the meaning of love and faithfulness amid surroundings and situations which the society, as a whole, condemns as debased and depraved. The world outside the brothel affirms its faith in the dignity of man, but people are often treated as worthless and unimportant creatures. However, within the world of prostitution, Fanny Hill finds friendship, understanding, respect and is treated as a person of value. When her absent lover returns, she is not a lost girl of the gutter. One perceives that she is a whole and healthy person who has discovered the ability to love and be loved in a brothel.

I think Cleland is suggesting that one must be cautious about what is condemned and what is held in honor.

From Dr. Peale's viewpoint, the story of Fanny Hill is a tragedy because she did not demonstrate self-control. She refused to internalize the values inherent in the Judeo-Christian tradition and the catalog of sexual scenes in the book, fifty-two in all, are a symbol of the debased individual and the society in which he lives.

Dr. Peale and others, would be correct in saying that Fanny Hill did not demonstrate self-control. She did, however, come to appreciate the value of self-expression. At no time were her "clients" looked upon as a means to an end. She tried and did understand them and she was concerned about them as persons. When her lover, Charles, returned she was not filled with guilt and remorse. She accepted herself as she was and was able to offer him her love and devotion.

I have a feeling that many people fear the book *Fanny Hill,* not because of its sexual scenes, but because the author raises serious question with the issue of what is moral and what is immoral. He takes exception to the idea that repression and restraint create moral individuals. He develops the thought that self-expression is more human than self-control. And he dares to suggest that, in a situation which society calls immoral and debased, a genuine love and respect for life and for people, as human beings, can develop. Far from glorifying vice, John Cleland points an accusing finger at the individual who is so certain as to what it means to be a moral man.

There are those who will quickly say that this "message" will be missed by the average person who reads *Fanny Hill.* But this is precisely the point. We become so accustomed to pre-judging what is ethical and what is immoral that we are unable to recognize that what we accept as good may be nothing less than evil because it harms people.

I know of no book which more beautifully describes meaningful relationships between a man and a woman than does *Fanny Hill.* In many marriages, men use a woman for sexual gratification and otherwise, as well as vice versa. But this is not the case in the story of Fanny Hill. The point is simply that there are many, many ways in which we hurt, injure and degrade people that are far worse than either being or visiting a prostitute. We do this all in the name of morality.

At the same time that Dr. Peale is concerned with sick people, John Cleland attempts to describe healthy ones. *Fanny Hill* is a more modern and certainly more valuable book than *Sin, Sex and Self-Control* because the author does not tell us how to behave, but attempts to help us understand ourselves and the nature of love and understanding in being related to other persons. Dr. Peale's writing emphasizes the most useful commodities available to man—self-centeredness and self-control. John Cleland suggests that self-understanding and self-expression may not be as popular, but they are more humane.

The "Peale approach" to life breeds contentment, for it suggests that each one of us can be certain as to what is good and true. Standards for thinking and behavior are available and all we need to do is appropriate them for our use. In a day when life is marked by chaos and confusion, this viewpoint offers much in the way of comfort and satisfaction. There is only one trouble with it, however, and that is that it results in conformity, rigid behavior and a lack of understanding. It results in personality configurations that are marked with an intense interest in propositions about Truth and Right but, at the same time, build a wall against people. Such an attitude creates certainty, but there is little warmth. The idea develops that there are "my kind of people" and they are "right." It forces us to degrade, dismiss

and ultimately attempt to destroy anyone who does not agree with us.

To be alive and sensitive to life means that we have to choose what we want. There is no possible way for a person to be a slave and free at the same time. Self-control and self-expression are at opposite ends of the continuum. As much as some persons would like to have both, it is necessary to make a choice, since restraint and openness are contradictory qualities. To internalize external values denies the possibility of self-expression. We must decide what we want, when it comes to conformity and creativity. If we want people to behave in a structured and predictable manner, then the ideal of creativity cannot have meaning.

. . . . .

Long ago Plato said, "What is honored in a country will be cultivated there." More and more, we reward people for thinking alike and as a result, we become frightened, beyond belief, of those who take exception to the current consensus. If our society collapses, it will not be because people read a book such as *Fanny Hill.* It will fall, because we will have refused to understand it. Decadence, in a nation or an individual, arises not because there is a lack of ability to distingush between morality and immorality, but because the opportunity for self-expression has been so controlled or strangled that the society or the person becomes a robot.

The issue which a Dr. Peale will never understand, because he is a victim of it himself and which John Cleland describes with brilliant clarity and sensitive persuasion is that until we learn to respect ourselves enough that we leave each other alone, we cannot discover the meaning of morality.

Dr. Peale and Fanny Hill offer the two basic choices open to man. Man is free to choose an autocentric existence which is marked by freedom from ambiguity

and responsibility. Autocentricity presupposes a "closed world" where life is predetermined and animal-like. In contrast to this view, there is the allocentric outlook which is marked by an "open encounter of the total person with the world." Growth, spontaneity and expression are the goals of such an existence.

Dr. Peale epitomizes the autocentric approach. He offers "warm blankets" and comfortable "cocoons" for those who want to lose their humanity. On the other hand, *Fanny Hill* represents the allocentric viewpoint which posits the possibility for man to raise his sights, stretch his imagination, cultivate his sensitiveness as well as deepen and broaden his perspectives. In discussing the autocentric idea, Floyd W. Matson writes,

> "Human beings conditioned to apathy and affluence may well prefer this regressive path of least resistance, with its promise of escape from freedom and an end to striving. But we know at least that it is open to them to choose otherwise: in a word, to *choose themselves.*" (*The Broken Image,* page 193.)

In a day when people are overly sensitive in drawing lines between the good and the bad, the right and the wrong, as well as the true and the false, it seems to me that there is great irony in the availability of a book such as *Fanny Hill.* Prostitution may be the oldest profession in the world, but we are ever faced with a question which is becoming more and more disturbing: "What does a prostitute look like?"

SUPREME COURT OF THE UNITED STATES

No. 368.—October Term, 1965.

A Book Named "John Cleland's Memoirs of a Woman of Pleasure," et al., Appellants, *v.* Attorney General of the Commonwealth of Massachusetts.	On Appeal From the Supreme Judicial Court of Massachusetts.

[March 21, 1966.]

Mr. Justice Clark, dissenting.

It is with regret that I write this dissenting opinion. However, the public should know of the continuous flow of pornographic material reaching this Court and the increasing problem States have in controlling it. *Memoirs of a Woman of Pleasure*, the book involved here, is typical. I have "stomached" past cases for almost 10 years without much outcry. Though I am not known to be a purist—or a shrinking violet—this book is too much even for me. It is important that the Court has refused to declare it obscene and thus gives it further circulation. In order to give my remarks the proper setting I have been obliged to portray the book's contents, which gives me embarrassment. However, quotations from typical episodes would so debase our reports that I will not follow that course.

I.

Let me first pinpoint the effect of today's holding in the obscenity field. While there is no majority opinion in this case, there are three Justices who import a new test into that laid down in *Roth* v. *United States*, 354 U. S. 476 (1957), namely, that "a book cannot be proscribed unless it is found to be utterly without redeem-

ing social value." I agree with my Brother WHITE that such a condition rejects the basic holding of *Roth* and gives the smut artist free rein to carry on his dirty business. My vote in that case—which was the deciding one for the majority opinion—was cast solely because the Court declared the test of obscenity to be: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." I understood that test to include only two constitutional requirements: (1) the book must be judged as a whole, not by its parts; and (2) it must be judged in terms of its appeal to the prurient interest of the average person, applying contemporary community standards.[1] Indeed, obscenity was denoted in *Roth* as having *"such slight social value as a step to truth that any benefit that may be derived . . . is clearly outweighed by the social interest in order and morality. . . .* At 485. Quoting *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 571–572 (1942). Moreover, in no subsequent decision of this Court has any "utterly without redeeming social value" test been suggested, much less expounded. My Brother HARLAN in *Manual Enterprises, Inc.* v. *Day,* 370 U. S. 478 (1962), made no reference whatever to such a requirement in *Roth.* Rather he interpreted *Roth* as including a test of "patent offensiveness" besides "prurient appeal." Nor did my Brother BRENNAN in his concurring opinion in *Manual Enterprises* mention any "utterly without redeeming social value" test. The first reference to such a test was made by my Brother BRENNAN in *Jacobellis* v. *Ohio,* 378 U. S. 184, 191 (1964), seven years after *Roth.* In an opinion joined only by Justice Goldberg, he there wrote: "Recognizing that the test enunciated [in *Roth*] is not

[1] See Lockhart and McClure, Censorship of Obscenity: The Developing Community Standards, 45 Minn. L. Rev. 5, 53–55 (1960).

perfect, we think any substitute would raise equally difficult problems, and we therefore adhere to that standard." Nevertheless, he proceeded to add:

> "We would reiterate, however, our recognition in *Roth* that obscenity is excluded from the constitutional protection only because it is 'utterly without redeeming social importance,' . . . ."

This language was then repeated in the converse to announce this *non sequitur:*

> "It follows that material dealing with sex in a manner that advocates ideas . . . or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity and denied the constitutional protection."

Significantly no opinion in *Jacobellis*, other than that of my Brother BRENNAN, mentioned the "utterly without redeeming social importance" test which he there introduced into our many and varied previous opinions in obscenity cases. Indeed, rather than recognizing the "utterly without social importance" test, THE CHIEF JUSTICE in his dissent in *Jacobellis*, which I joined, specifically stated:

> "In light of the foregoing, I would reiterate my acceptance of the rule of the *Roth* case: *Material is obscene and not constitutionally protected against regulation and proscription* if 'to the average person, applying contemporary standards, the dominant theme of the material taken as a whole appeals to prurient interest.'" (Emphasis added.) At 202.

THE CHIEF JUSTICE and myself further asserted that the enforcement of this rule should be committed to the state and federal courts whose judgments made pursuant to the *Roth* rule we would accept, limiting our review to a consideration of whether there is "sufficient evidence" in the record to support a finding of obscenity. At 202.

II.

Three members of the majority hold that reversal here is necessary solely because their novel "utterly without redeeming value" test was not properly interpreted or applied by the Supreme Judicial Court of Massachusetts. Massachusetts now has to retry the case although the "Findings of Fact, Rulings of Law and Order for Final Decree" of the trial court specifically held that "this book is 'utterly without social redeeming importance' in the fields of art, literature, science, news or ideas of any social importance and that it is obscene, indecent and impure." I quote portions of the findings:

> "Opinions of experts are admitted in evidence to aid the Court in its understanding and comprehension of the facts, but, of course, an expert cannot usurp the function of the Court. Highly artificial, stylistic writing and an abundance of metaphorical descriptions are contained in the book but the conclusions of some experts were pretty well strained in attempting to justify its claimed literary value: such as the book preached a moral that sex with love is better than sex without love, when Fanny's description of her sexual acts, particularly with the young boy she seduced, in Fanny's judgment at least, was to the contrary. *Careful review of all the expert testimony has been made,* but, the best evidence of all, is the book itself and it plainly has no value because of ideas, news or artistic, literary or scientific attributes. . . . Nor does it have any other merit. 'This Court will not adopt a rule of law which states obscenity is suppressible but well written obscenity is not.' Mr. Justice Scileppi in *People* v. *Fritch,* 13 N. Y. 2d 119." (Emphasis added.) Finding 20.

None of these findings of the trial court were overturned on appeal, although the Supreme Judicial Court of Massachusetts observed in addition that "the fact that testimony may indicate this book has some minimal literary value does not means that it is of any social importance. We do not interpret the 'social importance' test as requiring that a book which appeals to prurient interest and is patently offensive must be unqualifiedly worthless before it can be deemed obscene." My Brother BRENNAN reverses on the basis of this casual statement, despite the specific findings of the trial court. Why, if the statement is erroneous, Brother BRENNAN does not affirm the holding of the trial court which beyond question is correct, one cannot tell. This course has often been followed in other cases.

In my view evidence of social importance is relevant to the determination of the ultimate question of obscenity. But social importance does not constitute a separate and distinct constitutional test. Such evidence must be considered together with evidence that the material in question appeals to prurient interest and is patently offensive. Accordingly, we must first turn to the book here under attack. I repeat that I regret having to depict the sordid episodes of this book.

III.

Memoirs is nothing more than a series of minutely and vividly described sexual episodes. The book starts with Fanny Hill, a young 15-year-old girl, arriving in London to seek household work. She goes to an employment office where through happenstance she meets the mistress of a bawdy house. This takes 10 pages. The remaining 200 pages of the book detail her initiation to various sexual experiences, from a lesbian encounter with a sister prostitute to all sorts and types of sexual debauch-

ery in bawdy houses and as the mistress of a variety of men. This is presented to the reader through an uninterrupted succession of descriptions by Fanny, either as an observer or participant, of sexual adventures so vile that one of the male expert witnesses in the case was hesitant to repeat any one of them in the courtroom. These scenes run the gamut of possible sexual experience such as lesbianism, female masturbation, homosexuality between young boys, the destruction of a maide. ead with consequent gory descriptions, the seduction of a young virgin boy, the flagellation of male by female, and vice versa, followed by fervid sexual engagement, and other abhorrent acts, including over two dozen separate bizarre descriptions of different sexual intercourses between male and female characters. In one sequence four girls in a bawdy house are required in the presence of one another to relate the lurid details of their loss of virginity and their glorification of it. This is followed the same evening by "publick trials" in which each of the four girls engages in sexual intercourse with a different man while the others witness, with Fanny giving a detailed description of the movement and reaction of each couple.

In each of the sexual scenes the exposed bodies of the participants are described in minute and individual detail. The pubic hair is often used for a background to the most vivid and precise descriptions of the response, condition, size, shape, and color of the sexual organs before, during and after orgasms. There are some short transitory passages between the various sexual episodes, but for the most part they only set the scene and identify the participants for the next orgy, or make smutty reference and comparison to past episodes.

There can be no doubt that the whole purpose of the book is to arouse the prurient interest. Likewise the repetition of sexual episode after episode and the candor

with which they are described renders the book "patently offensive." These facts weigh heavily in any appraisal of the book's claims to "redeeming social importance."

Let us now turn to evidence of the book's alleged social value. While unfortunately the state offered little testimony,[2] the defense called several experts to attest that the book has literary merit and historical value. A careful reading of testimony, however, reveals that it has no substance. For example, the first witness testified:

> "I think it is a work of art . . . it asks for and receives a literary response . . . presented in an orderly and organized fashion, with a fictional central character, and with a literary style. . . . I think the central character is . . . what I call an intellectual . . . someone who is exceedingly curious about life and who seeks . . . to record with accuracy the details of the external world, physical sensations, psychological responses . . . an empiricist . . . . I find that this tells me things . . . about the 18th Century that I might not otherwise know."

If a book of art is one that asks for and receives a literary response, *Memoirs* is no work of art. The sole response evoked by the book is sensual. Nor does the orderly presentation of *Memoirs* make a difference; it presents nothing but lascivious scenes organized solely to arouse prurient interest and produce sustained erotic tension.[3] Certainly the book's baroque style cannot vitiate the

[2] In a preface to the paperbook edition, "A Note on the American History of *Memoirs of a Woman of Pleasure*, the publisher itself mentions several critics who denied the book had any literary merit and found it totally undistinguished. These critics included Ralph Thompson and Clifton Fadiman. P. xviii.

[3] As one review stated: "Yet all these pangs of defloration are in the service of erotic pleasure—Fanny's and the reader's. Postponing the culmination of Fanny's deflowering is equivalent to postponing the point where the reader has a mental orgasm."

determination of obscenity. From a legal standpoint, we must remember that obscenity is no less obscene though it be expressed in "elaborate language." Indeed, the more meticulous its presentation, the more it appeals to the prurient interest. To say that Fanny is an "intellectual" is an insult to those who travel under that tag. She was nothing but a harlot—a sensualist—exploiting her sexual attractions which she sold for fun, for money, for lodging and keep, for an inheritance, and finally for a husband. If she was curious about life, her curiosity extended only to the pursuit of sexual delight wherever she found it. The book describes nothing in the "external world" except bawdy houses and debaucheries. As an empiricist, Fanny confines her observations and "experiments" to sex, with primary attention to depraved, lewd, and deviant practices.

Other experts produced by the defense testified that the book emphasizes the profound "idea that a sensual passion is only truly experienced when it is associated with the emotion of love" and that the sexual relationship "can be a wholesome, healthy, experience itself," whereas in certain modern novels "the relationship between the sexes is seen as another manifestation of modern decadence, insterility or perversion." In my view this proves nothing as to social value. The state court properly gave such testimony no probative weight. A review offered by the defense noted that "where 'pornography' does not brutalize, it idealizes. The book is, in this sense, an erotic fantasy—and a male fantasy, at that, put into the mind of a woman. The male organ is phenomenal to the point of absurdity." Finally, it saw the book as "a minor fantasy, deluding as a guide to conduct, but respectful of our delight in the body . . . an interesting footnote in the history of the English novel." These unrelated assertions reveal to me nothing whatever of literary, historical, or social value. Another re-

view called the book "a great novel . . . one which turns its conventions upside down . . . ." Admittedly Cleland did not attempt "high art" because he was writing "an erotic novel. He can skip the elevation and get on with the erections." Fanny's "downfall" is seen as "one long delightful swoon into the depths of pleasurable sensation." Rather than indicating social value in the book, this evidence reveals just the contrary. Another item offered by the defense described *Memoirs* as being "widely accredited as the first deliberately dirty novel in English." However, the reviewer found Fanny to be "no common harlot. Her 'Memoirs' combine literary grace with a disarming enthusiasm for an activity which is, after all, only human. What is more, she never uses a dirty word." The short answer to such "expertise" is that none of these so-called attributes have any value to society. On the contrary, they accentuate the prurient appeal.

Another expert described the book as having "detectable literary merit" since it reflects "an effort to interpret a rather complex character . . . going through a number of very different adventures." To illustrate his assertion that the "writing is very skillfully done" this expert pointed to the description of a whore, "Phoebe, who is 'red faced, fat and in her early 50's, who waddles into a room.' She doesn't walk in, she waddles in." Given this standard for "skillful writing," it is not suprising that he found the book to have merit.

The remaining experts testified in the same manner, claiming the book to be a "record of the historical, psychological, and social events of the period." One has but to read the history of the 18th century to disprove this assertion. The story depicts nothing besides the brothels that are present in metropolitan cities in every period of history. One expert noticed "in this book a tendency

away from nakedness during the sexual act which I find an interesting sort of sociological observation" on tastes different from contemporary ones. As additional proof, he marvels that Fanny "refers constantly to the male sexual organ as an engine . . . which is pulling you away from the way these events would be described in the 19th or 20th century." How this adds social value to the book is beyond my comprehension. It only indicates the lengths to which these experts go in their effort to give the book some semblance of value. For example, the ubiquitous descriptions of sexual acts are excused as being necessary in tracing the "moral progress" of the heroine, and the giving of a silver watch to a servant is found to be "an odd and interesting custom that I would like to know more about." This only points up the bankruptcy of *Memoirs* in both purpose and content, adequately justifying the trial court's finding that it had absolutely no social value.

It is, of course, the duty of the judge or the jury to determine the question of obscenity, viewing the book by contemporary community standards. It can accept the appraisal of experts or discount their testimony in the light of the material itself or other relevant testimony. So-called "literary obscenity," *i. e.*, the use of erotic fantasies of the hard-core type clothed in an engaging literary style has no constitutional protection. If a book deals solely with erotic material in a manner calculated to appeal to the prurient interest, it matters not that it may be expressed in beautiful prose. There are obviously dynamic connections between art and sex—the emotional, intellectual, and physical—but where the former is used solely to promote prurient appeal, it cannot claim constitutional immunity. Cleland uses this technique to promote the prurient appeal of *Memoirs*. It is true that Fanny's perverse experiences finally bring from her the observation that "the height

of [sexual] enjoyment cannot be achieved until true affection prepares the bed of passion." But this merely emphasizes that sex, wherever and however found, remains the sole theme of *Memoirs*. In my view, the book's repeated and unrelieved appeals to the prurient interest of the average person leave it utterly without redeeming social importance.

IV.

In his separate concurrence, my Brother DOUGLAS asserts there is no proof that obscenity produces anti-social conduct. I had thought that this question was foreclosed by the determination in *Roth* that obscenity was not protected by the First Amendment. I find it necessary to comment upon Brother DOUGLAS' views, however, because of the new requirement engrafted upon *Roth* by Brother BRENNAN, *i. e.*, that material which "appeals to the prurient interest" and which is "patently offensive" may still not be suppressed unless it is "utterly without redeeming social value." The question of anti-social effect thus becomes relevant to the more limited question of social value. Brother BRENNAN indicates that the social importance criteria encompasses only such things as the artistic, literary, and historical qualities of the material. But the phrasing of the "utterly without redeeming social value" test suggests that other evidence must be considered. To say that social value may "redeem" implies that courts must balance alleged esthetic merit against the harmful consequences that may flow from pornography. Whatever the scope of the social value criterion—which need not be defined with precision here—it at least anticipates that the trier of fact weigh evidence of the material's influence in causing deviant or criminal conduct, particularly sex crimes, as well as its effect upon the mental, moral, and physical health of the average person. Brother DOUGLAS' view

as to the lack of proof in this area is not so firmly held among behavioral scientists as he would lead us to believe. For this reason, I should mention that there is a division of thought on the correlation between obscenity and socially deleterious behavior.

Psychological and physiological studies clearly indicate that many persons become sexually aroused from reading obscene material.[4] While erotic stimulation caused by pornography may be legally insignificant in itself, there are medical experts who believe that such stimulation frequently manifests itself in criminal sexual behavior or other anti-social conduct.[5] For example, Dr. George W. Henry of Cornell University has expressed the opinion that obscenity, with its exaggerated and morbid emphasis on sex, particularly abnormal and perverted practices, and its unrealistic presentation of sexual behavior and attitudes, may induce anti-social conduct by the average person.[6] A number of sociologists think that this material may have adverse effects upon individual mental health, with potentially disruptive consequences for the community.[7]

In addition, there is persuasive evidence from criminologists and police officials. Inspector Herbert Case of the Detroit Police Department contends that sex murder cases are invariably tied to some form of obscene litera-

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[4] For a summary of experiments with various sexual stimuli see Cairns, Paul, and Wishner, Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence, 46 Minn. L. Rev. 1009 (1962). The authors cite research by Kinsey disclosing that obscene literature stimulated a definite sexual response in a majority of the male and female subjects tested.

[5] *E. g.*, Wertham, Seduction of the Innocent (1954), p. 164.

[6] Testimony before the Subcommittee of the Judiciary Committee to Investigate Juvenile Delinquency, S. Rep. No. 2381, 84th Cong., 2d Sess., pp. 8–12 (1956).

[7] Sorokin, The American Sex Revolution (1956).

ture.[8] And the Director of the Federal Bureau of Investigation, J. Edgar Hoover, has repeatedly emphasized that pornography is associated with an overwhelmingly large number of sex crimes. Again, while the correlation between possession of obscenity and deviant behavior has not been conclusively established, the files of our law enforcement agencies contain many reports of persons who patterned their criminal conduct after behavior depicted in obscene material.[9]

The clergy are also outspoken in their belief that pornography encourages violence, degeneracy and sexual misconduct. In a speech reported by the New York Journal-American, August 7, 1964, Cardinal Spellman particularly stressed the direct influence obscenity has on immature persons. These and related views have been confirmed by practical experience. After years of service with the West London Mission, Rev. Donald Soper found that pornography was a primary cause of prostitution. Rolph, Does Pornography Matter? (1961), pp. 47–48.[10]

Congress and the legislatures of every State have enacted measures to restrict the distribution of erotic and pornographic material,[11] justifying these controls by

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[8] Testimony before the House Select Committee on Current Pornographic Materials, H. R. Rep. No. 2510, 82d Cong., 2d Sess., p. 62 (1952).

[9] See, *e. g.*, Hoover, Combating Merchants of Filth: The Role of the FBI, 25 U. Pitt. L. Rev. 469 (1964); Hoover, The Fight Against Filth, The American Legion Magazine (May 1961).

[10] For a general discussion see Murphy, Censorship: Government and Obscenity (1963), pp. 131–151.

[11] The statutes are compiled in S. Rep. No. 2381, 84th Cong., 2d Sess., pp. 17–23 (1956). While New Mexico itself does not prohibit the distribution of obscenity, it has a statute giving municipalities the right to suppress "obscene" publications. N. M. Stat. § 14–17–14 (1965 Supp.).

reference to evidence that anti-social behavior may result in part from reading obscenity.[12] Likewise, upon another trial, the parties may offer this sort of evidence along with other "social value" characteristics that they attribute to the book.

But this is not all that Massachusetts courts might consider. I believe it can be established that the book "was commercially exploited for the sake of prurient appeal, to the exclusion of all other values" and should therefore be declared obscene under the test of commercial exploitation announced today in *Ginzburg* and *Mishkin*.

As I have stated, my study of *Memoirs* leads me to think that it has no conceivable "social importance." The author's obsession with sex, his minute descriptions of phalli, and his repetitious accounts of bawdy sexual experiences and deviant sexual behavior indicate the book was designed solely to appeal to prurient interests. In addition, the record before the Court contains extrinsic evidence tending to show that the publisher was fully aware that the book attracted readers desirous of vicarious sexual pleasure, and sought to profit solely from its prurient appeal. The publisher's "Introduction" recites that Cleland, a "never-do-well bohemian," wrote the book in 1749 to make a quick 20 guineas. Thereafter, various publications of the book, often "embellished with fresh inflammatory details" and "highly exaggerated illustrations," appeared in "surreptitious circulation." Indeed, the cover of *Memoirs* tempts the reader with the announcement that the sale of the book has finally been permitted "after 214 years of suppression." Although written in a sophisticated tone, the "Introduction" re-

[12] See Report of the New York State Joint Legislative Committee Studying the Publication and Dissemination of Offensive and Obscene Material (1958), pp. 141–166.

peatedly informs the reader that he may expect graphic descriptions of genitals and sexual exploits. For instance, it states:

> "Here and there, Cleland's descriptions of love-making are marred by what perhaps could be best described as his adherence to the 'longitudinal fallacy'—the formidable bodily equipment of his most accomplished lovers is apt to be described with quite unnecessary relish . . . ."

Many other passages in the "Introduction" similarly reflect the publisher's "own evaluation" of the book's nature. The excerpt printed on the jacket of the hard-cover edition is typical:

> "*Memoirs of a Woman of Pleasure* is the product of a luxurious and licentious, but not a commercially degraded, era. . . . For all its abounding improprieties, his priapic novel is not a vulgar book. It treats of pleasure as the aim and end of existence, and of sexual satisfaction as the epitome of pleasure, but does so in a style that despite its inflammatory subject, never stoops to a gross or unbecoming word."

Cleland apparently wrote only one other book, a sequel called *Memoirs of a Coxcomb,* published by Lancer Books, Inc. The "Introduction" to that book labels *Memoirs of a Woman of Pleasure* as "the most sensational piece of erotica in English literature." I dare say that this fact alone explains why G. P. Putnam's Sons published this obscenity—preying upon prurient and carnal proclivities for its own pecuniary advantage. I would affirm the judgment.

SUPREME COURT OF THE UNITED STATES

No. 368.—October Term, 1965.

A Book Named "John Cleland's Memoirs of a Woman of Pleasure," et al., Appellants, *v.* Attorney General of the Commonwealth of Massachusetts.	On Appeal From the Supreme Judicial Court of Massachusetts.

[March 21, 1966.]

Mr. Justice Harlan, dissenting.

The central development that emerges from the aftermath of *Roth* v. *United States*, 354 U. S. 476, is that no stable approach to the obscenity problem has yet been devised by this Court. Two Justices believe that the First and Fourteenth Amendments absolutely protect obscene and nonobscene material alike. Another Justice believes that neither the States nor the Federal Government may suppress any material save for "hard-core pornography." *Roth* in 1957 stressed prurience and utter lack of redeeming social importance;[1] as *Roth* has been expounded in this case, in *Ginzburg* v. *United States*, *post*, p. —, and in *Mishkin* v. *New York*, *post*, p. —, it has undergone significant transformation. The concept of "pandering," emphasized by the separate opinion of The Chief Justice in *Roth*, now emerges as an uncertain gloss or interpretive aid, and the further requisite of "patent offensiveness" has been made explicit as a result of intervening decisions. Given this tangled state of affairs, I feel free to adhere to the principles first

[1] Given my view of the applicable constitutional standards, I find no occasion to consider the place of "redeeming social importance" in the majority opinion in *Roth*, an issue which further divides the present Court.

set forth in my separate opinion in *Roth*, 354 U. S., at 496, which I continue to believe represent the soundest constitutional solution to this intractable problem.

My premise is that in the area of obscenity the Constitution does not bind the States and the Federal Government in precisely the same fashion. This approach is plainly consistent with the language of the First and Fourteenth Amendments and, in my opinion, more responsive to the proper functioning of a federal system of government in this area. See my opinion in *Roth*, 354 U. S., at 505–506. I believe it is also consistent with past decisions of this Court. Although some 40 years have passed since the Court first indicated that the Fourteenth Amendment protects "free speech," see *Gitlow* v. *New York*, 268 U. S. 652; *Fiske* v. *Kansas*, 274 U. S. 380, the decisions have never declared that every utterance the Federal Government may not reach or every regulatory scheme it may not enact is also beyond the power of the State. The very criteria used in opinions to delimit the protection of free speech—the gravity of the evil being regulated, see *Schneider* v. *State*, 308 U. S. 147; how "clear and present" is the danger, *Schenck* v. *United States*, 249 U. S. 47, 52 (Holmes, J.); the magnitude of "such invasion of free speech as is necessary to avoid the danger," *United States* v. *Dennis*, 183 F. 2d 201, 212 (L. Hand, J.)—may and do depend on the particular context in which power is exercised. When, for example, the Court in *Beauharnais* v. *Illinois*, 343 U. S. 250, upheld a criminal group-libel law because of the "social interest in order and morality," 343 U. S., at 257, it was acknowledging the responsibility and capacity of the States in such public-welfare matters and not committing itself to uphold any similar federal statute applying to such communications as Congress might otherwise regulate under the commerce power. See also *Kovacs* v. *Cooper*, 336 U. S. 77.

Federal suppression of allegedly obscene matter should, in my view, be constitutionally limited to that often described as "hard-core pornography." To be sure, that rubric is not a self-executing standard, but it does describe something that most judges and others will "know . . . when [they] see it" (STEWART, J., in *Jacobellis* v. *Ohio*, 378 U. S. 184, 197) and that leaves the smallest room for disagreement between those of varying tastes. To me it is plain, for instance, that "Fanny Hill" does not fall within this class and could not be barred from the federal mails. If further articulation is meaningful, I would characterize as "hard-core" that prurient material that is patently offensive or whose indecency is self-demonstrating and I would describe it substantially as does MR. JUSTICE STEWART'S opinion in *Ginzburg*, *post*, p. 3. The Federal Government may be conceded a limited interest in excluding from the mails such gross pornography, almost universally condemned in this country.[2] But I believe the dangers of national censorship and the existence of primary responsibility at the state level amply justify drawing the line at this point.

State obscenity laws present problems of quite a different order. The varying conditions across the country, the range of views on the need and reasons for curbing obscenity, and the traditions of local self-government in matters of public welfare all favor a far more flexible attitude in defining the bounds for the States. From my standpoint, the Fourteenth Amendment requires of a State only that it apply criteria rationally related to

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[2] This interest may be viewed from different angles. Compelling the Post Office to aid actively in disseminating this most obnoxious material may simply appear too offensive in itself. Or, more concretely, use of the mails may facilitate or insulate distribution so greatly that federal inaction amounts to thwarting state regulation.

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the accepted notion of obscenity and that it reach results not wholly out of step with current American standards. As to criteria, it should be adequate if the court or jury considers such elements as offensiveness, pruriency, social value, and the like. The latitude which I believe the States deserve cautions against any federally imposed formula listing the exclusive ingredients of obscenity and fixing their proportions. This approach concededly lacks precision, but imprecision is characteristic of mediating constitutional standards; [3] voluntariness of a confession, clear and present danger, and probable cause are only the most ready illustrations. In time and with more litigated examples, predictability increases, but there is no shortcut to satisfactory solutions in this field, and there is no advantage in supposing otherwise.

I believe the tests set out in the prevailing opinion, judged by their application in this case, offer only an illusion of certainty and risk confusion and prejudice. The opinion declares that a book cannot be banned unless it is "utterly without redeeming social value" (*ante*, p. 5). To establish social value in the present case, a number of acknowledged experts in the field of literature testified that "Fanny Hill" held a respectable place in serious writing, and unless such largely uncontradicted testimony is accepted as decisive it is very hard to see that the "utterly without redeeming social value" test has any meaning at all. Yet the prevailing opinion, while denying that social value may be "weighed against" or "canceled by" prurience or offensiveness (*ante*, p. 6),

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[3] The deterrent effect of vagueness for that critical class of books near the law's borderline could in the past be ameliorated by devices like the Massachusetts *in rem* procedure used in this case. Of course, the Court's newly adopted "panderer" test, turning as it does on the motives and actions of the particular defendant, seriously undercuts the effort to give any seller a yes or no answer on a book in advance of his own criminal prosecution.

terminates this case unwilling to give a conclusive decision on the status of "Fanny Hill" under the Constitution.[4] Apparently, the Court believes that the social value of the book may be negated if proof of pandering is present. Using this inherently vague "pandering" notion to offset "social value" wipes out any certainty the latter term might be given by reliance on experts, and admits into the case highly prejudicial evidence without appropriate restrictions. See my dissenting opinion in *Ginzburg, post,* p. —. I think it more satisfactory to acknowledge that on this record the book has been shown to have some quantum of social value, that it may at the same time be deemed offensive and salacious, and that the State's decision to weigh these elements and to ban this particular work does not exceed constitutional limits.

A final aspect of the obscenity problem is the role this Court is to play in administering its standards, a matter that engendered justified concern at the oral argument of the cases now decided. Short of saying that no material relating to sex may be banned, or that all of it may be, I do not see how this Court can escape the task of reviewing obscenity decisions on a case-by-case basis. The views of literary or other experts could be made controlling, but those experts had their say in "Fanny Hill" and apparently the majority is no more willing than I to say that Massachusetts must abide by their verdict. Yet I venture to say that the Court's burden of decision would be ameliorated under the constitu-

[4] As I understand the prevailing opinion, its rationale is that the state court may not condemn "Fanny Hill" as obscene after finding the book to have a modicum of social value; the opinion does note that proof of pandering "might justify the conclusion" that the book wholly lacks social value (*ante,* p. 6). Given its premise for reversal, the opinion has "no occasion to assess" for itself the pruriency, offensiveness, or lack of social value of the book (*ante,* p. 6).

tional principles that I have advocated. "Hard-core pornography" for judging federal cases is one of the more tangible concepts in the field. As to the States, the due latitude my approach would leave them ensures that only the unusual case would require plenary review and correction by this Court.

There is plenty of room, I know, for disagreement in this area of constitutional law. Some will think that what I propose may encourage States to go too far in this field. Others will consider that the Court's present course unduly restricts state experimentation with the still elusive problem of obscenity. For myself, I believe it is the part of wisdom for those of us who happen currently to possess the "final word" to leave room for such experimentation, which indeed is the underlying genius of our federal system.

On the premises set forth in this opinion, supplementing what I have earlier said in my opinions in *Roth, supra, Manual Enterprises, Inc.* v. *Day,* 370 U. S. 478, and *Jacobellis* v. *Ohio,* 378 U. S. 203, I would affirm the judgment of the Massachusetts Supreme Judicial Court.

SUPREME COURT OF THE UNITED STATES

No. 368.—October Term, 1965.

A Book Named "John Cleland's Memoirs of a Woman of Pleasure," et al., Appellants, *v.* Attorney General of the Commonwealth of Massachusetts.	On Appeal From the Supreme Judicial Court of Massachusetts.

[March 21, 1966.]

Mr. Justice White, dissenting.

In *Roth* v. *United States*, 354 U. S. 476, the Court held a publication to be obscene if its predominant theme appeals to the prurient interest in a manner exceeding customary limits of candor. Material of this kind, the Court said, is "utterly without redeeming social importance" and is therefore unprotected by the First Amendment.

To say that material within the *Roth* definition of obscenity is nevertheless not obscene if it has some redeeming social value is to reject one of the basic propositions of the *Roth* case—that such material is not protected *because* it is inherently and utterly without social value.

If "social importance" is to be used as the prevailing opinion uses it today, obscene material, however far beyond customary limits of candor, is immune if it has any literary style, if it contains any historical references or language characteristic of a bygone day, or even if it is printed or bound in an interesting way. Well written, especially effective obscenity is protected; the poorly written is vulnerable. And why shouldn't the fact that some people buy and read such material prove its "social value"?

A fortiori, if the predominant theme of the book appeals to the prurient interest as stated in *Roth* but the book nevertheless contains here and there a passage decriptive of character, geography or architecture, the book would not be "obscene" under the social importance test. I had thought that *Roth* counseled the contrary: That the character of the book is fixed by its predominant theme and is not altered by the presence of minor themes of a different nature. The *Roth* Court's emphatic reliance on the quotation from *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, means nothing less:

> "'. . . There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. *These include the lewd and obscene . . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . .*' (Emphasis added.)" 354 U. S., at 485.

In my view, "social importance" is not an independent test of obscenity but is relevant only to determining the predominant prurient interest of the material, a determination which the court or the jury will make based on the material itself and all the evidence in the case, expert or otherwise.

Application of the *Roth* test, as I understand it, necessarily involves the exercise of judgment by legislatures, courts and juries. But this does not mean that there are no limits to what may be done in the name of *Roth.* Cf. *Jacobellis* v. *Ohio,* 378 U. S. 184. *Roth* does not mean that a legislature is free to ban books simply because they deal with sex or because they appeal to the

prurient interest. Nor does it mean that if books like *Fanny Hill* are unprotected, their nonprurient appeal is necessarily lost to the world. Literary style, history, teachings about sex, character description (even of a prostitute) or moral lessons need not come wrapped in such packages. The fact that they do impeaches their claims to immunity from legislative censure.

Finally, it should be remembered that if the publication and sale of *Fanny Hill* and like books are proscribed, it is not the Constitution that imposes the ban. Censure stems from a legislative act, and legislatures are constitutionally free to embrace such books whenever they wish to do so. But if a State insists on treating *Fanny Hill* as obscene and forbidding its sale, the First Amendment does not prevent it from doing so.

I would affirm the judgment below.